(32,682)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 242

J. W. HAMPTON, JR., & CO., PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

INDEX

	Original	Print
Record from court of customs appeals	1	1
Petition for review	1	1
Schedule "A"—Importations and entries protested	2	2
Schedule "B"—Assignments of error	2	2
Return of board of appraisers	7	6
Proceedings before board of U. S. general appraisers	8	7
Protest of J. W. Hampton & Co	8	7
Report of collector	9	9
Answer to protest	11	10
Stipulation re evidence, etc	11	10
Opinion, McClelland, G. A	12	11
Concurring opinion, Sullivan, G. A	27	25
Dissenting opinion, Brown, G. A	44	42
Judgment	74	71
Order allowing filing of brief as amicus curiæ	75	71
Argument and submission (omitted in printing)	75	
Certificate of importance	76	72
Opinion, Graham, J	77	73
Judgment	102	105
Certificate re mandate	102	105
Clerk's certificate (omitted in printing)	103	
Order allowing certiorari	104	106

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[fols. a-1]

IN UNITED STATES COURT OF CUSTOMS APPEALS

Suit No. 2761

Protest No. 92874-G/19385

J. W. HAMPTON, JR., & Co., Appellants,

vs.

THE UNITED STATES, Appellee

PETITION FOR REVIEW—Filed April 24, 1926

To the Honorable the United States Court of Customs Appeals:

Your petitioner, having complied with the statutes in such case made and provided, and being dissatisfied with the decisions and decree of judgment of the Board of United State General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, as to the construction of the law and the facts respecting the classification of certain merchandise and the rate of duty imposed thereon under such classification, respectfully prays that the said Court of Customs Appeals review the questions of law and fact involved in said decisions, and for that purpose prays that an order be entered requiring the said Board of Appraisers to return to said Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decisions thereon. And your petitioner also prays for such other or further orders or relief in the premises as the statutes provide or to the Court shall seem just.

[fol. 2] The particulars of the errors of law and fact involved in said decisions of said Board of Appraisers of which your petitioner complains are set forth in the an-

nexed Schedule B which is hereby referred to and made a part hereof.

Dated New York, April 23, 1926.

J. W. Hampton, Jr., & Co., Petitioner, by Walter Evans Hampton, Attorney, 17 Battery Place, New York City.

SCHEDULE A TO PETITION

The following are the importations and entries covered by this proceeding, with the approximate dates thereof, and with such other data as are convenient for purposes of identification:

Entry No.	Vessel.	Entered.	Protest No.	Decision.
W. 37133	Port Macquarrie.....	6/20/24	92874G/19385	April 6, 1926
917135	Port Macquarrie.....	6/20/24	92874G/19385	April 6, 1926
918818	Port Macquarrie.....	6/20/25	92874G/19385	April 6, 1926

SCHEDULE B TO PETITION

Assignments of Error

The Board of United States General Appraisers has confirmed the action of the Collector of the Port of New York, in assessing and exacting duty at Six (6) cents per pound on Barium Dioxide, thereby making errors of law and fact by failing to find, or finding the contrary of, the following proposition:

I. In not sustaining the protest and overruling the same.

II. In not holding the merchandise dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September, 1922.

III. In not holding that the assessment and liquidation purported to have been made under authority of the Presi- [fol. 3] dent, by Section 315, Title III, of said act, is unconstitutional and void; that the President's proclamation, dated May 19, 1924, T. D. 40216, is unconstitutional and void.

IV. In not holding that the assessment was made by reason of an illegal delegation to the Executive Department by the Congress of the United States, of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress. (Art. 1, Sec. 1.)

V. In not holding the assessment was made under an illegal delegation to the Executive Department, by the Congress of the power to tax, which power is alone lodged in the Congress of the United States. (Art. 1, Sec. 8.)

VI. In not holding that even if the act or acts was or were done by constitutional delegation of legislative power of the taxing power, that Sec. 315, of said Act, purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon the difference of cost of production at home and abroad, and based upon the selling prices abroad and at home, all of which is not a tax or duty within the meaning of the Federal Constitution.

VII. In not holding that the Collector's action, the act or acts of the Tariff Commission, and the act of the President of the United States, were singly and collectively, null and void, being unconstitutional; that is to say, being contrary to the expressed provisions of the Federal Constitution and the specific grants of power bestowed by the people to, and in the Congress of the United States, as specifically provided for by the Constitution.

VIII. In not holding the Federal Legislature cannot delegate its executive grant of power to legislate; and cannot delegate its exclusive grant of power to tax.

IX. In not holding that said powers were alone and exclusively granted to the Federal Legislature by the people of the sovereign states.

X. In not holding that the section in question, on its face and by its context, clearly shows designs to be accomplished other than that of raising revenue, and that said design or designs were to secure and maintain a special [fol. 4] policy for special interests, and not for general Government taxation purposes.

XI. In holding that the delegation by the Congress to the President of the powers expressed in sec. 315, was not a delegation of legislative authority, or of the power to tax in violation of Sections 1 and 8, of Article 1, of the Federal Constitution.

XII. In holding that the President, in making such investigation, and in determining the difference between the cost of production of Barium Dioxide in the United States and in Germany, as well as fixing the rate of duty which would equal such difference, was but carrying out the expressed will of Congress, and such action was therefore, in no sense, a usurpation of the constitutional privileges of that body.

XIII. In not holding that the alleged facts which the Executive is to determine, cannot be, and are not precisely sfated by the Legislature, and therefore, cannot be certainly ascertained by the Executive.

XIV. In not holding that the act was incomplete in præsenti.

XV. In holding and reasoning: "It is our view that the power thus vested in the President was definite and specific and left nothing to his discretion provided the purpose of the law clothing him with such power was faithfully carried out, and it is of course to be presumed the purpose of the law was faithfully executed."

XVI. In reasoning and holding: "Depending upon the proofs presented and the facts ascertained upon investigation it might have been definitely found that the difference in cost of production was anywhere, as we have said, from 1 to 50 per cent more than the rate being assessed under the tariff law in operation."

XVII. In holding: "In thus finding and proclaiming a duty of 6 cents per pound on barium dioxide the President did not legislate nor impose a tax."

XVIII. In holding: "The President in making such investigation and in determining the difference in such cost of production, as well as fixing a rate of duty which would [fol. 5] equal such difference, was carrying out the expressed will of Congress, and was in no sense usurping the constitutional privilege of that body."

XIX. In holding and reasoning: "In naming this rate Congress evidently did not ascertain the difference in the cost of production of this commodity in the United States and in the competing country."

XX. In reasoning and holding: "The medium through which the change in duty was to be determined did not depend on the one that made the investigation. It was the result that created the change."

XXI. In not holding that the Supreme Court has repeatedly recognized inherent limitations upon the Federal taxing power growing out of the separation of governmental powers and the necessary implications arising therefrom.

XXII. In holding that it is the duty of the courts to assume that every tax passed by the Legislature is valid; but that on the contrary, the duty is to scrutinize carefully the act of the Legislature to ascertain the extent thereof and its possibilities of destruction.

XXIII. In not holding that the scheme proposed in said section is impossible of being precisely stated for certain ascertainment by the Executive.

XXIV. In not holding: "The sole function of the courts, in relation to taxes, is to say whether they have been legally appraised and levied upon a proper construction of the statute or whether the statute is a violation of constitutional principles."

XXV. In not distinguishing between a tax and a toll.

XXVI. In not holding that there can be no lawful tax which is not laid for public purpose and that the levy here is not for public purposes, but for a special interest.

XXVII. In not holding that it is the duty of the judges to act for the benefit of the whole people and not merely as servants of the Assembly or Legislature.

XXVIII. In not holding and deciding: "It is the duty of all courts * * *, in deciding constitutional cases, to be eternally vigilant in guarding and defending the fundamental American principles and traditions which [fol. 6] that great instrument" (the Federal Constitution) "was designed to secure and perpetuate."

XXIX. In not holding that it was, and is, impossible, because of the very nature of the thing, to find reasonably, and not arbitrarily, and because of the inherent uncertainties thereof, the difference in cost of production at home and abroad.

XXX. In not distinguishing the issue here from the case of Field v. Clark (143 U. S., 649).

XXXI. In reasoning and holding that there is perfect analogy in Interstate Commerce matters and cases in the case at bar.

XXXII. In not reasoning and holding that in delegating to commissions and boards and the like, that the acts thereof are always subject to inquiry as to their reasonableness and whether or not they are arbitrary.

XXXIII. In reasoning and holding that the act of the President is similar, and in effect the same, as the action of the Board of United States General Appraisers in finding values of merchandise.

J. W. Hampton, Jr., & Co., Petitioner, by Walter Evans Hampton, Attorney, 17 Battery Place, New York City.

[File endorsement omitted.]

[fol. 7] IN U. S. COURT OF CUSTOMS APPEALS

[Title omitted]

RETURN OF BOARD OF U. S. GENERAL APPRAISERS

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court having ordered the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:-

A copy of

1. Protest 92874-G/19385 with the reports of the collector of customs and the United States Appraiser thereon.

2. Stipulation of counsel.

3. The Board's decision in question, G. A. 9116 (T. D. 41478), and judgment order.

The entry papers will be forwarded later.

Witness the Honorable W. B. Howell, President of the Board, this 11th day of May, A. D. 1926.

D. P. Dutcher, Chief Clerk. G. V. O. (Seal.)

Constitutionality—Flexible tariff.

[fol. 8] BEFORE BOARD OF U. S. GENERAL APPRAISERS

PROTEST 92874-G OF J. W. HAMPTON, JR., & CO.

80041, 80042, 80043

New York, N. Y., April 7, 1925.

To the Honorable the Collector of Customs, Port of New York, N. Y.

SIR: We hereby protest against your decision assessing duty at the rate of six (6) cents per pound, or other rate or rates, on certain merchandise known and assessed as Barium Dioxide, or Barium Peroxide, and or other merchandise, covered by entries below mentioned.

We claim that the merchandise is properly dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September 21, 1922.

We further claim that if the assessment and liquidation of duty is purposed to be made by authority of the President

under section 315, etc., Title III, of said act, it is unconstitutional and void; that the President's proclamation dated May 19, 1924, T. D. 40216, is unconstitutional and void:

(1) Because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress.

Article I

"Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

(2) Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by "Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *."

(3) Even if in form it has been done by constitutional delegation of legislative power and of the taxing power, it purports on its face to make a levy, not for raising public [fol. 9] revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

We further claim that your action and decision, the acts of the Tariff Commission, and the act of the President of the United States, are singly, and collectively, null and void, being unconstitutional; that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only and contained in said Constitution.

Entry Nos.	Steamers.	Arrived.	Liquidated.	Mks. & Nos.
W. 37133	Port Macquarrie....	6/20/24	2/13/25	Var. 225 Drums
917125	Port Macquarrie....	6/24/24	3/12/25	Var. 15 Drums
918818	Port Macquarrie....	6/24/24	2/14/25	Var. 52 Drums

J. W. Hampton, Jr. & Co.

Notify Walter E. Hampton c/o J. W. Hampton, Jr. & Co., 17 Battery Place, New York, N. Y.

BEFORE BOARD OF U. S. GENERAL APPRAISERS

REPORT OF COLLECTOR

19385.
Name: J. W. Hampton, Jr. & Co.
Subject: Barium Peroxide.
Entry Nos. W. 37133, 917125, 918818.
92874-G.

Indorsed: Received May 6, 1925. Board of U. S. General Appraisers, D. P. Dutcher, chief clerk.

Indorsed: Received April 8, 1925. Custom House, New York.

[fol. 10] The date of entry, liquidation and protest are correctly specified herein, F. W. D.

19385. May 4, 1925.

Respectfully referred to the Board of U. S. General Appraisers for decision.

The entries herein enumerated cover importations of Barium Dioxide made in the S/S Port Macquarrie which arrived at this port on June 21, 1924 and subsequent to the proclamation by the President of the United States on the 19th day of May, 1924, directing, after due investigation and under the authority given him in Section 315 of the Tariff Act of 1922, an increase in the duty assessed on Barium Dioxide in Paragraph 12, from 4 to 6 cents per pound.

The president's proclamation increasing the rate of duty was published in T. D. 40216, and in pursuance to the instructions contained therein, this office assessed duty on the Barium Dioxide at 6 cents per pound.

Note the Appraiser's special report, herewith.

Entries Nos. 917125 and 918818 were made for consumption, and the merchandise released from Customs Custody under duty paid permits on June 24, 1924. The merchandise covered by warehouse bond entry 37133 was withdrawn as follows: 3 drums November 5, 1924, 75 drums November 7, 1924, 75 drums November 17, 1924. The remainder is still in store. Protest was received within the statutory time.

Philip Elting, Collector.

[fol. 11] BEFORE BOARD OF U. S. GENERAL APPRAISERS

ANSWER TO PROTEST

United States Customs Service, Appraiser's Office, Port of New York

4/29/25.

Protest No. 19385.
Importer: J. W. Hampton, Jr. & Co.
Invoice No. —.
Entry Nos. 917125, 918818.
Bond No. 37133.
Dates: 6/24/24, 6/20/24.

The merchandise is described on the invoices as barium peroxide and consists of barium dioxide. It was advisorily classified for duty by this office at 6c. per pound, in accordance with the President's proclamation of May 27, 1924, issued under Section 315-A of the Tariff Act of 1922, T. D. 40216.

Respectfully, F. J. H. Kracke, Appraiser.

Ex Bowen.

BEFORE BOARD OF U. S. GENERAL APPRAISERS, BOARD NO. 1
(CLASSIFICATION SIDE)

Protest No. 92874-G/19385

[Title omitted]

STIPULATION RE EVIDENCE, ETC.

It is hereby stipulated and agreed as follows:

That the Collector's letter transmitting the protest, the Appraiser's report, the custom house entry papers, and all other papers in the case, be admitted in evidence.

[fol. 12] That duty was taken by reason of T. D. 40216, 45 Treas. Dec., p. 669.

It is further stipulated that plaintiff have ten (10) days for brief, and that the United States have thirty (30) days therefrom.

Case is submitted.

W. E. Hampton, Attorney for Protestant. New York, N. Y., October 26, 1925. Fred J. Carter, Attorney for Government. New York, N. Y., October 26, 1925.

So ordered. Jerry B. Sullivan.

BEFORE BOARD OF UNITED STATES GENERAL APPRAISERS

G. A. 9116—T. D. 41478

Protest 92874-G/19385 of J. W. HAMPTON, JR., & COMPANY Against the Decision of the Collector of Customs at the Port of New York

Decided April 6, 1926

Before Board 1

OPINION

McCLELLAND, General Appraiser:

This is a protest against the classification of, and assessment of duty on, Barium Dioxide by the Collector of Customs at the Port of New York. The United States Appraiser in his special report on the protest to the collector states:

The merchandise is described on the invoice as barium peroxide and consists of barium dioxide. It was advisorily [fol. 13] classified for duty by this office at 6 cents per pound in accordance with the President's proclamation of May 27, 1924, issued under Section 315 A of the Tariff Act of 1922, T. D. 40216.

In harmony with the appraiser's report the collector assessed duty at six cents per pound and the importer duly protested against such assessment, claiming that the legal

rate of duty chargeable against such merchandise under the law in operation at the time of importation was four cents per pound. It is further claimed that if the collector's assessment at the six cent rate was "purposed to be made by authority of the President under Section 315, etc., Title III of said act, it is unconstitutional and void," and the President's proclamation was and is unconstitutional and void because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power by Article I of the Federal Constitution is solely committed to Congress.

Other grounds of objection to the said assessment are—

"Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by Section 8 of the United States Constitution which in so far as pertinent reads:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, * * *"

"Even if in form it has been done by constitutional delegation of legislative power and of the taxing power, it imports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax within the meaning of the Federal Constitution.

"* * * that upon action and decision, the acts of the Tariff Commission, and the act of the President of the United States are singly and collectively, null and void, being unconstitutional, that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only — and contained in said Constitution."

[fol. 14] The pertinent parts of Section 315 which vested in the President the power to make the investigation and issue the proclamation complained against are as follows:

Sec. 315 (a). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever

the President upon investigation of the differences in cost of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the Islands of Guam and Tutuila): Provided, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any Amendatory Act.

* * * * * * *

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices [fol. 15] of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such

investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties, interested to be present, to produce evidence and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

The following is the full text of the President's proclamation:

By the President of the United States of America—A Proclamation

"Whereas in and by Section 315 (a) of Title III of the Act of Congress approved September 21, 1922, entitled 'An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, [fol. 16] and for other purposes,' it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said

ascertained differences in such costs of production necessary to equalize the same;

"Whereas in and by Section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

"Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to the article described in paragraph 12 of Title I of said Tariff Act of 1922, namely, barium dioxide, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries; [fol. 17] "Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

"And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

"Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

"An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

Calvin Coolidge.

"By the President: Charles E. Hughes, Secretary of State." (Seal.)

[fol. 18] The title of the Tariff Act of 1922 of which Section 315, supra, is part is—

"An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes."

It is manifest from a mere reading of the title that the framers of this law and the Members of the Congress who voted in favor of its passage deliberately intended that the rates of duty to be imposed upon imported merchandise should be so regulated as to encourage,—yes, and protect as far as possible, the manufacturers of like merchandise in the United States against the lower cost of production of similar merchandise in foreign countries. This same purpose also was manifested in the titles of the Tariff Acts of 1897 and 1909 by the use of the words "Encourage the industries of the United States" in each of said titles, yet neither of these acts has been held to be unconstitutional because of its avowed purpose to encourage American industries, which is another name for the protection of such industries against the competition of merchandise produced in foreign countries at lower cost of production.

Narrowed down the issue presented must turn on the questions of whether—

(1) The power granted to the President under section 315, supra, is a delegation by the Congress of power to legislate, contrary to the provisions of Article 1, Section 1 of the Federal Constitution.

(2) The power so conferred on the President is a delegation of the power to tax which under the Constitution belongs exclusively to Congress.

The importance of such an issue as is here presented can not be overestimated, and courts therefore hesitate to declare statutes unconstitutional until such declaration may be made on clear and unmistakable grounds.

The question as to whether Section 315, supra, in so far as it confers on the President the power complained of is constitutional must be approached with recognition of a presumption in favor of the statute, and if, on final con-[fol. 19] sideration of such question there remains a doubt, such doubt must be construed to maintain the law. Cooley on Constitutional Limitation, 6th Ed. 216.)

A like question, involving the constitutionality of Section 3 of the Tariff Act of 1890, which vested in the President authority to suspend laws and impose duties within his discretion was presented to the Board of General Appraisers as far back as 1880, and Judge Somerville, writing the opinion for the Board, sustained the constitutionality of the law (G. A. 203, T. D. 10553). The protestants, whose cases were involved in that decision, appealed therefrom to the Circuit Courts of the United States in their respective districts, and in each instance the decision was affirmed. They were thereafter taken for review to the United States Supreme Court, where the constitutionality of the law was also sustained. See Field v. Clark (143 U. S. 649).

Section 3 of the Act of 1890, supra, the constitutionality of which was involved in that case, provided that——

"with a view to secure reciprocal trade with countries producing the following articles, and for this purpose * * * Whenever, and so often as the President shall be satisfied that the Government of any country producing and

exporting sugars, molasses, coffee, tea, and hides, * * * imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows:"

Then follows an enumeration of the articles, together with the rates of duty that should be imposed thereon during such suspension.

[fol. 20] Mr. Justice Harlan, writing for the majority of the court in the Field case, supra, and especially with reference to Section 3, supra, said:

"To what extent do precedents in legislation sustain the validity of the action under consideration, so far as it makes the suspension of certain provisions and the going into operation of other provisions of an Act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation? If we find that Congress has frequently, from the organization of the Government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by the third section of the Act of October 1, 1890, that fact is entitled to great weight in determining the question before us" (p. 683).

* * * * * * *

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The Act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense,

invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the Act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left [fol. 21] to the determination of the President. The words, 'he may deem,' in the third section, of course, implied that the President would examine the commerical regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and de-

clare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

"'The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a descretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be [fol. 22] be done; to the latter no valid objection can be made.' Cincinnati, Wilmington, &c., Railroad v. Commissioners, 1 Ohio St. 88. In Moers v. City of Reading, 21 Penn. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So in Locke's Appeal, 72 Penn. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.'"

There is this distinction between the power vested in the President under Section 3, supra, and Section 315, supra. The rates of duty to be put in effect on the happening of certain contingencies were definitely named in Section 3, supra, whereas in Section 315, supra, it was left with the

President to fix a rate or rates which would equal the differences between the cost of production of merchandise of foreign manufacture and like merchandise manufactured in the United States, not to exceed 50 per centum of the rate named in the existing tariff law, and that in ascertaining the differences in such cost of production the President insofar as he might find it practicable, should take into consideration the differences in conditions in production including wages, cost of material and other items of cost of production of such or similar articles in the United States and in [fol. 23] competing countries as directed in the following paragraph of Section 315:

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

To assist the President in ascertaining such differences in cost of production the Tariff Commission is required to make investigation, and in making such investigation to give reasonable public notice of its hearings and reasonable opportunity to the parties interested to be present to produce evidence and to be heard, and for the conduct of such hearings the Commission is authorized to adopt such reasonable rules and regulations as it may deem necessary.

In the instant case such an investigation was made and the President in his proclamation, supra, found that the duty fixed in Title I in the act of the Congress approved September 21, 1922, did not equal the differences between the cost of production in the United States and the cost of production in Germany of barium dioxide, and therefore determined and proclaimed an increase in duty on such

merchandise of fifty per cent over the rate named in Title I as aforesaid, to equal the difference between such cost of production in Germany and the United States.

At this point it becomes pertinent to consider whether there was in thus empowering the President to determine and proclaim a rate of duty a delegation of legislative power and a delegation of the power to tax in violation of the Constitution of the United States.

[fol. 24] It is our view that the power thus vested in the President was definite and specific and left nothing to his discretion provided the purpose of the law clothing him with such power was faithfully carried out, and it is of course to be presumed the purpose of the law was faithfully executed. Before determining whether he should proclaim any change in the rate of duty on barium dioxide the President was required to find the fact of difference between the cost of production in the United States and in Germany on barium dioxide, after investigation and opportunity given to parties interested to be heard. Depending upon the proofs presented and the facts ascertained upon investigation it might have been definitely found that the difference in cost of production was anywhere, as we have said, from one to fifty per cent more than the rate being assessed under the tariff law in operation. The President's finding was that the actual difference was 50 per cent and having so found there remained in him no discretion as to the rate of duty he should determine upon and proclaim imported barium dioxide should be subject to after the expiration of thirty days from the date of such proclamation.

In thus finding and proclaiming a duty of six cents per pound on barium dioxide the President did not legislate nor impose a tax. In what he did he simply carried out the expressed will of Congress.

In substance it is urged in the brief of counsel for protestants that an absolutely definite or accurate finding of the difference between the cost of production of barium dioxide in Germany and the United States is impossible. This may or may not be true, but at least we are bound to assume that with the resources at the President's command, and presumably used by him in the investigation, his finding of fact

was as nearly accurate as it was humanly possible to make it. Nothing more is to be hoped for in any case.

The members of this tribunal are judges of both the law and the fact in every case presented to them. The facts are found from the evidence presented and when the law is applied to the facts so found the rate and amount of the duty the citizen must pay is determined.

Section 402 of the Tariff Act of 1922 provides five values upon which duties may be levied on imported merchandise: (1) Foreign value; (2) export value; (3) United States value; (4) cost of production; (5) the American selling [fol. 25] price, under certain conditions. Findings of either of these values are made on the evidence presented in each case, but the more pertinent for illustration here is cost of production as defined in paragraph (e) of Section 402, supra, as follows:

(e) For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of man-

ufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

It is true that the ascertainment of cost of production by this tribunal as above defined is a judicial proceeding, but we fail to comprehend why the finding of the President complained against might not be as accurate and reliable as a basis for the assessment of duty as a finding of cost of production by this Board.

[fol. 26] As was said in Buttfield v. Stranahan (192 U. S., 470), in construing the act to prevent the importation of impure and unwholesome tea—

The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

* * * * * * *

Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment,

to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him.

* * * * * * *

Congress in framing Section 315 manifestly contemplated that there might develop greater differences between costs of production of commodities in foreign countries and the [fol. 27] United States than existed at the time of the passage of the Tariff Act of 1922, and therefore delegated to the President the power to ascertain through investigation whether and to what extent such changes took place. The President in making such investigation and in determining the difference in such cost of production, as well as fixing a rate of duty which would equal such difference was carrying out the expressed will of Congress, and was in no sense usurping the constitutional privileges of that body.

For the reasons hereinbefore stated the protest must be overruled and the decision of the Collector affirmed.

Chas. P. McClelland, U. S. General Appraiser.

Before Board of U. S. General Appraisers

Concurring Opinion

Sullivan, General Appraiser:

In concurring in the judgment of General Appraiser McClelland as to the constitutionality of Section 315 (a) of the flexible provisions of the Tariff Act of 1922, I desire to present my reasons therefor:

The protest in this case was filed against the exaction of a duty of six cents per pound on certain barium dioxide, it being contended the duty should be four cents per pound, as provided in paragraph 12 of the Tariff Act of 1922; that the rate of six cents per pound is a proclaimed rate by the President as set forth in T. D. 40216, dated May 19, 1924, and is void as being legislation.

The law empowering him to do so is found in the Tariff Act of 1922, being Section 315 (a).

It is the protestant's contention that such proclaimed duty by the President is illegal, and the right so to do, as provided in the above section, is void.

It is further stated in the protest that even if in form the act of the President has been done by constitutional delegation of legislative power and of the taxing power, it purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection of American industries, based upon difference in cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

[fol. 28] Without question, the Constitution of the United States confines all legislation to the Congress of the United States. The first article of the Constitution provides:

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

It will not be questioned that if the act of the President, as provided in Section 315 (a) was and became a legislative act, then it is unconstitutional and void.

It was to remove the idea that an executive could legislate as had been customary prior to the adoption of our Constitution, that this section was adopted. Its importance was so great that it was the first provision to receive the serious thought of the Constitutional Convention.

As to what is legislation does not admit of doubt. Legislation is the act of the law-making power of a sovereign state. It is essentially an act of sovereign power. In ascertaining whether or not the proclamation of the President became the act of a sovereign power, we must keep constantly in mind what he did and the extent of the power entrusted to him. With what power was he invested, and was it legislative?

The act itself provides:

Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing for-

eign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. * * * Provided, That the total increase or decrease of [fol. 29] such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this act, or in any amendatory act.

At the time of the passage of the Tariff Act of 1922 of which the above section is a part, it was enacted that the duty on barium dioxide should be four cents per pound. In naming this rate Congress evidently did not ascertain the difference in the cost of production of this commodity in the United States and in the competing country. It evidently recognized the necessity of investigation. It therefore empowered the Chief Executive Officer of the United States to make such investigation, and if he found a difference in cost of production greater than the duty provided by the act, such duty should be increased to the extent of such difference not exceeding 50 per centum. Was that legislation? It seems to me it was not. The officer entrusted with this duty may have been the President of the United States; he may have been any other administrative officer. The medium through which the change in duty was to be determined did not depend on the one that made the investigation. It was the result that created the change.

The enactment of Section 315 (a) indicates that Congress was not satisfied as to whether the rate of duty provided in paragraph 12 was or was not satisfactory; therefore, it expressed its intent to have the duty fixed according to the difference between the cost of production in this country and that of the competing foreign country.

It will be observed we are dealing entirely with sub-section (a), and not with sub-section (b) of Section 315.

Sub-section (b) has reference solely to the American selling price.

Sub-section (c) states what the President should take into consideration in arriving at the cost of production,

namely, the difference in conditions, wages, cost of material, and other items entering into the cost of such or similar articles in the United States and in competing countries.

In his proclamation the President found the difference in the cost of production as provided in subsection (a).

As to whether or not Sub-section (b) of Section 315 is constitutional, is not involved in this hearing.

[fol. 30] In the exercise of the power granted to the President to investigate he could call to his assistance whatever means were needful to the ascertainment of the result. The law itelf provided that he could do so through the medium of the United States Tariff Commission, and his proclamation should not be issued until such investigation had been made.

He was not limited to an investigation by the Tariff Commission, although it was recognized this medium was the most available to ascertain the difference. It it was found there was a difference in the cost of production the moment this fact was ascertained, the proclaimed rate of duty took effect to the extent of this difference whether higher or lower than the rate prescribed by the paragraph. It did not require any act outside of the proclamation to place in effect this difference. The proclamation merely made known the result of his investigation. The investigation ascertained the difference in the cost of production. That difference may have been 10, 20, 30, 40 or 50 per cent. Whatever it may have been it instantly became the Act of Congress to that extent.

The ascertainment of this difference in the cost was not a delegation of a legislative power. It was not discretionary on the President's part, nor a matter of judgment.

This proclamation stated what he ascertained, as follows:

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely,

Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

This does not indicate that the President exercised his judgment in fixing the rate or amount of duty. It is the mere ascertainment of the fact as to the difference, and his statement——

[fol. 31] An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

indicates there was this difference between the cost of production in this country and the competing country, and thereby became the rate of duty as provided by law.

Under all the authorities it seems to me such fact finding conclusion cannot be legislation.

It must be kept constantly in mind that Congress in the exercise of its power did not transfer to the President a legislative right, but a right to ascertain a fact.

It is true, Congress could have made this investigation itself. Would any one for a moment contend that to do so would have been in the ordinary course of legislation? What period of time it took the President to ascertain this difference we do not know; nor the method or means he adopted. These are matters with which we are not interested. We cannot question the mode he pursued. We do know that a Congress that sought to make the cost of production of articles in this country as the basis of the rate of duty, would be in continuous session for years if it sought to ascertain such fact itself.

To provide for that contingency it entrusted this duty to the President, and gave him adequate power to ascertain this fact, and to call in bodies to assist him, one of which was the Tariff Commission.

This question as to the delegation of fact finding process and whether it is legislation has been many times before the courts, state as well as federal. The difficulties of the legislative body in ascertaining facts are set out in a very clear and comprehensive way by the Supreme Court of Minnesota in the case of State v. Ry. Co., 38 Minn. 281 N. W. 782:

* * * The maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not necessarily enter. Wayman v. Southard, 10 Wheat. (U. S.) 1, 46, 6 L. Ed. 253. The principle is repeatedly recognized by all courts that the Legislature may authorize others to do things which it might [fol. 32] properly but cannot conveniently or advantageously, do itself. All laws are carried into execution by officers appointed for the purpose; some with more, others with less, but all clothed with power sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the Legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution. * * *

That authority clearly gives the reason and necessity of a fact finding body, and speaks in unequivocal terms of the inefficiency of a legislative body itself attempting to do what an administrative body could do in a more complete and less expensive way.

It is true, that cause was reversed by the Supreme Court of the United States (Railway Co. v. Minnesota, 134 U. S. 418), but it was not reversed on any of the grounds alleged with reference to the delegation of the finding of facts. In fact, the Supreme Court approved of the findings of the court below with reference to the acts of a commission to which it delegated the power to investigate. It was reversed on the ground that the Supreme Court of Minnesota, at a period of time in our national history when the railroad rate question was uppermost in the West, absorbing the thought of every one as to its proper solution, upheld a law that was confiscation of property within the due process clause of the constitution, and therefore its judgment was reversed.

There was not dissent on the ground it was a delegation of legislative power.

It was contended, as it is in the case at bar, that it was not constitutional for the Legislature of Minnesota to delegate to a commission the power to fix rates for transportation, and that so far as it attempted to thus confer authority it was void under the Constitution of the State of Minnesota.

[fol. 33] The opinion rendered by Justice Blatchford, referring to the decision of the Supreme Court of Minnesota, stated:

It then proceded to examine the question of the validity of the act under the Constitution of Minnesota, as to whether the Legislature was authorized to confer upon the Commission the powers given to the lattter by the statute. It held that, as the Legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

Not a word in the opinion disapproved of that conclusion of the Minnesota court.

In a concurring opinion by Justice Miller, he stated:

The power which the Legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the act now under consideration.

In a dissenting opinion Justice Bradley arrived at the same conclusion on the power to delegate authority, for he stated:

* * * I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the Board in this case was, to regulate and fix the charges, so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command,—just as they would be at the command of the Legislature which created it.

Such a body, though not a court, is a proper tribunal for the duties imposed upon it.

[fol. 34] Thus we have the complete unity of the Supreme Court of the United States in holding that the Minnesota Legislature had the power to entrust to a commission the ascertainment of facts.

It will not be questioned by any one that the fixing of rates for the transportation of property is a legislative act, as much so as any tax provided for in the Constitution of the United States.

For a complete answer to the question as to whether Congress can delegate the right to ascertain a fact, and upon the ascertainment of such fact can entrust to the one thus ascertaining the duty of putting it into effect by proclamation, see Field v. Clark, 143 U. S. 649.

Keeping in mind the rule enunciated in the Clark case, supra, that the authority conferred upon the President to suspend by proclamation the free introduction of certain merchandise into the United States, when he is satisfied that any country producing such merchandise imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the President,—we can then follow more clearly the holding of the court in subsequent decisions as to the effect of what is called legislative power.

A very clear expression as to this power is contained in Buttfield v. Stranahan, 192 U. S. 470, being an act with reference to the importation of unwholesome tea. It was there held that the act permittting standards to be established was not a delegation of legislative power. The act referred to in the opinion of the court was quite extensive, and considerable discretion was granted to the Board to ascertain whether or not the tea was wholesome. The court held that what the Board did was not legislation, but merely to ascertain the simple fact of the wholesomeness or unwholesomeness of an article imported into the United States for domestic use.

The court in its opinion deals very extensively with foreign commerce, and the plenary power that Congress possesses to legislate on this subject. Referring to the Clark case, supra, the court stated:

[fol. 35] We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

To deal in foreign commerce is not a natural right. All commerce may be excluded, and yet not a constitutional right invaded. This fact was first enunicated by Thomas Jefferson in his letters to the American ministers at London and Paris, while he was Secretary of State. Therefore, when we seek to levy a duty upon that which comes into the country, in a legislative way, there cannot be a complaint.

The same question arose in Union Bridge Company v. United States, 204 U. S., 364. In this case the question at issue was the power conferred upon the Secretary of War to ascertain whether or not bridges are of insufficient height or width of span, or are otherwise defective, so as to be unreasonable obstructions to navigation.

The law further provided it should be the duty of the Secretary, after giving reasonable notice to alter such bridge so as to render navigation reasonably free, specifying the changes as recommended by a body of civil engineers, if such obstructions were not removed, to refer the matter to the United States District Attorney for criminal prosecution.

The powers conferred upon the Secretary were great. He could almost destroy property, yet the court, speaking through Justice Harlan, referring again to the Clark case, supra, and the legislative history of this subject, stated:

It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers

[fol. 36] strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. Gibbons v. Ogden, 9 Wheat. 1, 189, 190. As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require National Legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of [fol. 37] enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense,

exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval the conclusion could not be avoided that Executive officers, in all the Departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature.

This is very ample authority on the question, and follows the rule in the Minnesota case that these matters of detail in ascertaining a fact, may be entrusted to commissions or executive officers for the carrying out of the will of the Legislature.

Congress passed in 1893 what is known as "The Safety Appliance Act" and entrusted to the American Railway Association and the Interstate Commerce Commission the duty of designating and promulgating the standard height and maximum variation of drawbars for freight cars. It was contended that this act was unconstitutional, as a delegation of the legislative power, not permitted by the Constitution.

The Supreme Court of the United States in St. Louis, Iron Mountain and Southern Railway Company v. Taylor, administratrix, 210 U. S., 281, held that this act was constitutional.

The law is set out in the opinion, and it enumerates minutely that the American Railway Association is authorized to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars measured perpendicularly from the level of the top of the rails to the centers of the drawbars, for each of the several gauges of rail- [fol. 38] roads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars; that upon their determination being certified to the Interstate Commerce Commission, the Commission shall at once

give notice of the standard fixed upon to all common carriers by such means as the Commission may deem proper.

It then further provided that, should the association fail to determine a standard, the Interstate Commerce Commission had the power.

It will be observed that two parties were here designated to ascertain the facts, first, the American Railway Association, and, second, the Interstate Commerce Commission, to whom the American Railway Association was to report.

The Commission issued its order, as provided, as the result of the investigation, giving minutely the height of the drawbars, measuring even to inches, the maximum variation permitted.

With reference to its constitutionality the court stated:

It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in Buttfield v. Stranahan, 192 U. S., 470, a case which in principle is completely in point. And see Union Bridge Co. v. United States, 204 U. S., 364, where the cases were reviewed.

We can well apply that rule to the issue in the case at bar. The President only carried out the intention of Congress as to the cost of production, and having found it he was empowered to proclaim the result of that finding. Such act was not a delegation of legislative power.

A very exhaustive discussion of many of these questions is contained in Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194. That case had refer-
[fol. 39] ence not only to the power of the Commission to fix a rate, but required railroad and other interstate companies to keep their accounts in a certain way, leaving it to the Commission to provide the manner and method in which these accounts should be kept. As to Section 20 of this act the opinion states:

Congress, in Section 20, has authorized the Commission to inquire as to the business which the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within it power.

With reference to the delegation of legislative power the court states:

Furthermore, it is said that such construction of Section 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. Buttfield v. Stranahan, 192 U. S., 470; Union Bridge Co. v. United States, 204 U. S., 384; United States v. Grimaud, 220 U. S., 506.

In Section 20, Congress has authorized the Commission to require annual reports. The act itself prescribed in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority.

[fol. 40] This permission to require a uniform system of accounting, and the power conferred on the Commission, are much more discretionary than the power conferred upon the President to ascertain cost of production.

In Ocean Steam Navigation Co. v. Stranaham, 214 U. S., 320, the court was dealing with the admission of aliens into the United States, and to confiding the enforcement of the law in regard thereto to administrative officers.

The law empowered the Secretary of Commerce and Labor to exercise very extensive powers with reference to the introduction into the United States of aliens afflicted with a loathsome or dangerous contagious disease. The law is contained in Section 9 of the Alien Immigration Act of March 3, 1903, and enters minutely into powers that seem discretionary on the part of the Secretary of Commerce and Labor as to the ascertainment of the facts with reference to the existence of disease, and his right to use competent medical examiners, and exercise an authority over transportation companies and railways to prevent the introduction of such aliens into the country, and entrusting to executive and administrative officers a very extensive power to carry into effect the legislation of Congress.

This is an exhaustive opinion on the subject, and cites many cases approving of the doctrine that it is not a grant of legislative power to an individual or association to ascertain the facts with reference to the matters on which Congress had legislated and then carrying into effect that which is ascertained.

The power given to the Interstate Commerce Commission to make railroad rates, is certainly analogous to the question at bar.

The rate for the carriage of a ton of freight or of a passenger is surrounded by so many circumstances and facts that it would be wholly inadvisable to legislate directly thereon. So many factors, leading to what would be reasonable compensation upon the investment, enter therein, that it is practically impossible for a legislative body itself to ascertain this compensatory rate. It therefore provided that a body known as the Interstate Commerce Commission, should ascertain all the different factors that enter into a compensatory rate, and having ascertained such fact they were empowered to name the rate for the moving of such traffic.

[fol. 41] Its power to name a rate is well within the provisions of the section of the Constitution of the United States which provides that Congress shall have the power to regulate commerce with foreign countries, and among the several states and Indian tribes.

Under that provision Congress had the right to empower a body to carry out the details of the legislation that was enacted.

2nd. It necessarily follows, that by the section above quoted, Congress possesses ample and complete power over foreign commerce, and may, in the exercise of the right thus conferred, place such tax upon the introduction of foreign comerce as to practically prohibit its entrance. That is a political question, and not judicial. With the policy of such an enactment the courts are not interested. The question the court must pass on it whether or not, in the exercise of this right, it has done so within the power granted to it by the Constitution of the United States.

3d. It is claimed the difference between the cost of production of the domestic article and a like one in the foreign country, can not be determined with accuracy; that so many factors enter therein as to the same article produced in different parts of the same country, as to preclude a finding that is just and fair. This may be true, yet it does not sustain the proposition that the legislation is void. In determining this question, factors may be introduced that are misleading and without significance, and it may be that opinion and prejudice will enter thereon. That is a matter of administration, and does not affect the constitutionality of the act. The finite mind may be unable to establish a fact with mathematical precision. If in ascertaining the cost of producing an article in this country and a like one in a foreign country, where judgment must depend upon conclusions as to the probative effect of many factors, as to which minds may differ, inconsistencies arise, yet this does not necessarily result in an impairment of the legislation. It indicates the inability of the finite mind to arive at an accurate result.

As to whether or not this legislation is feasible cannot affect the question of its constitutionality. It is practicable, with a fair degree of accuracy, to ascertain the cost of pro- [fol. 42] ducing a bushel of grain, a ton of steel, or a ton of sugar. In doing so resort is had to the cost of labor, material, interest on the investment, and other conditions that arise with reference to producing such article.

All these questions enter into the administration of the statute, and are not valid constitutional objections to such legislation.

In arriving at a solution as to the constitutionality of the law the policy of the legislation is not involved, however

injudicious it may be, nor how much its construction by administrative bodies may be abused.

Congress is presumed to legislate within the provisions of the Constitution. It is the duty of the court, in construing such legislation, to ascertain whether it acted within its constitutional limitations.

The administration of an act is the province of an entirely separte body, and the court is powerless to offer advice thereon.

4th. It must be kept constantly in mind that the Congress of the United States declared in its passage of Section 315,—

That in order to regulate the foreign commerce of the United States and *to put into force and effect the policy of the Congress by this act intended*, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or pr-duct of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said defferences in costs of production * * * he shall, by such investigation, ascertain said differences and determine and proclaim the changes * * *.

(Italics ours.)

This statute clearly announces the policy of the Congress that the rate of duty on imporated merchandise shall be the difference in the cost of production of similar articles in the United States and those of the competing foreign country. With that in mind, it is evident to every thinking individual it would be impossible for the Congress of [fol. 43] the United States itself to give the time to ascertain such differences.

The details of investigation must be undertaken by a commission or executive officer with ample authority to ascertain the facts. How appropriate are the words of the Supreme Court of Minnesota in State v. Railway, supra:

* * * These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts,

and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution.

This statement is so true it cannot be enlarged. The ascertainment of a fact, embodying as it does some discretion or judgment as to the conclusion, does not arise to the dignity of legislation. Not to permit such fact-finding bodies, would, as the court said, block the wheels of government, and the sovereign state would find itself "hopelessly entangled in the meshes of its own constitution."

Admittedly commerce and trade are the life blood of a nation, and penalties placed thereon may lead to the lessening of influence and prosperity. This is a political question on which men have differed from the foundation of the Government; some advocating a free commercial relationship with all people and others denying such right. That the Constitution gave to the legislative body of our country full power to regulate commerce with foreign countries is unquestioned. Frequently has an embargo been placed upon foreign products by reason of conditions that were discriminatory against our commerce. It may not be a just policy to prevent the importation of foreign products, but the right to do so is unquestioned.

It therefore reasonably follows that the term "regulate" would empower the Congress of the United States to commit to a body, such as the Tariff Commission, any executive officer, or the President of the United States, the right to ascertain the differences in the cost of production, and when [fol. 44] his ultimate judgment was proclaimed it became the act of Congress of the United States with reference to the duty on the article under investigation.

It did not require any act on his part, except to proclaim his finding. His finding of the difference ipso facto became the law of Congress, as though it had provided such rate at the time of the enactment of paragraph 12.

If therefore follows that Section 315 (a) is constitutional. As this question is controlling the protest should be overruled.

Jerry B. Sullivan, U. S. General Appraiser.

BEFORE BOARD OF U. S. GENERAL APPRAISERS

DISSENTING OPINION

BROWN, General Appraiser:

This suit against the United States was brought in this court under the legal procedure provided by the customs acts. The collector took duty at the rate of 6 cents per pound upon certain barium dioxide by virtue of a Presidential Proclamation of May 19, 1924 (T. D. 40216, 45 Treasury Decision 669) increasing the rate 50 per centum under the authority of subdivisions (a) and (c) of Section 315, Title III, Tariff Act of September 21, 1922.

The inmporter claims that only the rate of 4 cents per pound prescribed by paragraph 12, under which classification is made, should have been collected; asking judgment for refund of all duty taken above that rate.

Testing the legality of a customs levy (necessarily including its constitutionality) is the purpose for which this jurisdiction was expressly established, as an improvement upon, and substitute for, the original common law remedy (U. S. v. Ranlett, etc., 172 U. S. bottom of page 145; U. S. v. Passavant 169 U. S. top of page 20).

The language of the present protest section (section 514, Act of 1922), permitting a legal contest (and full nisi prius trial before this Board as the court of first instance, United States v. Macy, 13 Ct. Cust. Appls., decided Nov. 21st 1925), of all decisions of the collector, affecting the rate and amount of duty, is very broad and expressly includes [fol. 45] the "legality of all orders and findings entering into the same." Moreover, the appeal provision Section 195 of the Judicial Code provides that certiorari to the United States Court of Customs Appeals, whose duties are appellate only, may be granted by the Supreme Court, without certificate of importance, in customs cases involving constitutional questions. The case of Field v. Clark, 143 U. S. 649, arose before this tribunal as reported in G. A. 203, T. D. 10553.

Section 315 of Title III of the Tariff Act of 1922 which purports to authorize such increase, so far as material, reads as follows:

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States * * * ; Provided, that the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of pro- [fol. 46] duction of articles provided for in Title I of this Act, whole or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of sub-division (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and

upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in sub-division (f) of Section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under sub-division (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States * * *.

(c) That in ascertaining the differences in costs of production, under the privisions of sub-divisions (a) and (b) of this section, the President, in so far as he finds it prac- [fol. 47] ticable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production, of such similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give

reasonable opportunity to parties interested to be present, to produce evidence and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

The Federal Constitution, Article 1, Section 1, reads:

All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

[fol. 48] Article 1, Section 8, paragraph 1, reads:

The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States.

The Supreme Court has repeatedly recognized inherent limitations upon the federal taxing power growing out of the separation of governmental powers and the necessary implications arising therefrom. Evans v. Gore, 253 U. S. 245; Collector v. Day, 11 Wall. 113; United States v. R. R. Co., 17 Wall. 332; Child Labor Tax case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44.

The maxim of our law first enunciated by Marshall, that the power to tax is the power to destroy, is not an admonition to the courts to assume that every tax passed by the Legislature is valid, but an admonition to scrutinize care-

fully whether the power exists, because of the realization that, if it exists, it may be used to the extent of destruction.

The power here sought to be granted is a very broad power. It is much broader than the power to find and declare discrimination by a foreign country against our commerce and thus put into force maximum tariff rates already written by the Legislature as in Field v. Clark.

It is power to find and declare the increase or decrease of an existing tariff duty, necessary to equalize the difference in production costs at home and abroad to the extent of 50 per centum, or if (in the case of ad valorem rates) an increase of 50 per centum in the rate is insufficient to meet such difference, to change an existing ad valorem to the American selling price of a "similar competitive" domestic article produced in the United States which, when used in substantially the same manner, produces substantially equal results as the imported article on which the tax is laid, though perhaps differing in structure and competition therefrom. Note the action taken upon diethylbarbituric acid under sub-section (b) in T. D 40474, 46 Treas. Dec. 352, and Tariff Commission's printed report thereon, where among two competing domestic articles the American selling price of a particular one is selected as the American valuation to be applied. Note also the in-[fol. 49] crease of duty on taximeters by the change on Dec. 12, 1925 (T. D. 41226) to the American valuation while lowering the ad valorem rate from 45 to 27.1 per centum.

The declared policy of the act differs from a strict rule based on the difference between foreign and domestic production costs whenever the 50 per centum limit prevents such equalization as to specific rates, i. e., rates at so much per pound, per bushel, per square yard, or other quantity.

Again, such difference in policy appears in the power to change the basis of assessment of an ad valorem duty. The shift to the American selling price measure of duty increases the amount of duty paid, in one step, from the measure by the foreign ad valorem. This could only be adjusted to a found difference in production costs, by, at the same time, lowering the existing ad valorem rate. The latter reduction can only be made to the extent of 50 per centum as provided by the last paragraph of subdivision (b) of Section 315. Consequently, if more than 50 per cen-

tum reduction in the existing rate should be required to make the new amount of duty to be paid, by reason of the changed ad valorem, fit the found cost of production difference; such equalization could not be made.

Thus the power to increase the amount of duty paid is much greater in the case of ad valorem rates than in the case of specific rates while the power to decrease is the same for both. Again, ad valorem rates may be decreased by only 50 per centum. But by changing the ad valorem basis the amount of duty paid may be increased to an amount varying for each article imported according to the price here of its particular American competitor and running perhaps to several hundred per centum.

This possible change to this new measure for ad valorem duty (as a method of increasing the actual tax paid), coupled with the 50 per centum limit upon changing the rate of duty, thus greatly adds to the complications and difficulties of the plan.

Moreover, it should be noted that subdivision (c) of Section 315, provides that:

> In ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, [fol. 50] shall take into consideration * * * (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States * * * and (4) any other advantages or disadvantages in competition.

The relation of these two considerations to determining the difference in production costs is not apparent.

These portions of subdivision (c), just quoted, were deliberately retained as they now read, after the power given to the President to change rates to equalize "conditions of competition" had been amended to equalize "costs of production." (Senate debate, Cong. Record, Vol. 62, Part 11, pages 11226 to 11229, of Aug. 11, 1922), Senator Walsh of Montana moved to strike out all of subdivision (c) down to and including the word "competition." His amendment was rejected. He said (page 11228):

> I do that, because according to my understanding, that is entirely inconsistent with the amendments heretofore

adopted declaring the difference in the cost of production to be the basis for fixing the rates by the President.

Senator Jones, of New Mexico, had previously said, page 11227:

> Is that the certain and fixed basis which the Senator from Wisconsin intended to establish as the one which must be used by the President in fixing rates? Did not the Senator from Wisconsin earnestly urge that the act would be unconstitutional unless we had a certain mathematical measure, unless it were made definite and certain? But the provision, as pointed out by the Senator from Montana, destroys the very certainty for which the Senator from Wisconsin pleaded.

Such is the provision, with these necessary complications and implications which is under attack, the constitutionality of which must be determined in this case.

So far, it has been assumed that the difference in cost of production at home and abroad can, with expert advice, be accurately ascertained and a duty fixed to equalize such difference.

[fol. 51] However, in his little book entitled "Making the Tariff in the United States" (1924), published by the Institute of Economics (McGraw-Hill Book Co., New York), Thomas Walker Page (a former chairman of the Tariff Commission), has demonstrated that it is impossible to calculate with accuracy the difference in cost of production at home and abroad. He devotes Chapter IV, entitled "Tariff Making by Formula," to a demonstration of this. His illustrations, pages 85 to 87, of attempts to separate the domestic cost of production of raising mutton from that of raising wool on the same sheep, and his illustrations, pages 88 to 90 of impossible attempts to separate the cost of incidental by-products, are conclusive and convincing. They show that the result must always largely depend upon the point of view and the method of bookkeeping or calculating employed by the person who attempts it. Among other things, he says, page 83:

> The application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to.

There is much misunderstanding as to what cost accounting can really show. It is true that no manager of any considerable and well-conducted business today fails to record the costs of the business and to make some analysis of them. He finds it desirable to do so in order to stop leaks, to promote efficiency, to exhibit the net profits of the enterprise, and for other purposes. There is a popular assumption that the records thus kept will accurately disclose the cost per unit of the products turned out. In fact, however, this is seldom the case.

Page 84:

A multitude of questions arise * * * Shall the materials used be valued at their market price, or at what it actually cost to produce them? Shall interest be allowed on the value of plant and equipment; and if so, is it proper to take the value of the plant as a "going concern," or is it better to take as the value for estimating cost the outlay of the owners in acquiring and improving it? Such questions suggest that costs can be made to seem either high or low by the system of accounting which is followed. It [fol. 52] might be possible in time to standardize the system and thus in a somewhat arbitrary way to reach a cost per unit of product in some industries that consist of simple and independent processes resulting in a single product. But such industries are relatively few. Modern industrial processes are commonly so organized and integrated that they contribute jointly to the completion of a number of different commodities. The accountant is usually faced therefore, with the problem of joint costs, and the solutions accepted are purely arbitrary and differ widely from one plant to another.

Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered * * * aside from any question as to how the total cost is constituted what is the basis on which it can be divided between the wool and the meat produced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total cost of sheep husbandry must in some way be dis-

tributed amongst the different products on which the duties are levied.

The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the commission reported that in Montana during 1919 the expenses for 821,222 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on investment, feed, fees and rentals, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The commission divided the joint costs between these two products in proportion to the sheep-owners' receipts from each of them. * * * The fallacy of the method is obvious since it makes it appear that the smaller the receipts from either product the lower will its cost be. This is clearly contrary to fact.

He then proceeds to show that a very hard winter for lambs, requiring unusual outlays to save any lambs at all, would reduce he proportionate receipts from lambs and in- [fol. 53] dicate, erroneously, of course, that the cost of lambs was exceptionally low, and that of the wool proportionately high, adding

and by a pernicious paradox if the lamb crop were a total failure the lambs would have cost nothing at all.

After further equally convincing illustrations his conclusion, on page 92, is as follows:

These illustrations suffice to show that variation in costs of production is general, that it can not be compensated by any method of bookkeeping, and that it can not be prevented by any device of human ingenuity.

Adding:

There is, in fact, no such thing as a single "domestic cost of production" for any commodity. There are almost as many different costs as there are producers; and the question arises: Which should be taken for comparison with a foreign cost to find a standard for measuring duties? It is obvious that the higher the figure taken the greater will be the proportion of the industry protected. But no

one would advocate duties high enough to protect producers whose high costs are due to unwise location, inadequate equipment, extravagant methods, or poor management. On the other hand, if the lowest cost be taken it might well result in no duty at all, for the lowest domestic costs are some times less than the lowest costs abroad.

After reviewing the difficulties in obtaining foreign costs he concludes, Chapter IV, with this general statement:

The conclusion can not be escaped that it is rarely possible to ascertain accurately the difference in costs of production at home and abroad. To use as the basis of a general tariff act of thing so fleeting, evasive, and shadowy would be neither right nor possible.

Philip G. Wright, in the Review of Reviews for November 1922, page 502, says:

In many cases, the collection of costs is impossible for the simple reason that they do not exist. What, for exam- [fol. 54] ple, is the cost of producing wool as distinguished from mutton, of hides as distinguished from beef, of gasoline as distinguished from kerosene, lubricating oil, and a dozen other petroleum products? Where costs can be ascertained it is found that no two manufacturers manufacture at the same cost, and the problem of selection arises. Shall it be the highest or lowest, the average or marginal that is to be used for determining the duty? Wages and prices of materials are extremely uncertain guides. In the case of twenty-nine sugar centrals in Cuba, all having the same opportunities for obtaining labor and materials, the highest unit cost was more than twice the lowest, with the costs for the other twenty-seven ranging in gradation between.

Grand*i*ng Page's demonstration that the difference in cost of production, of most articles of commerce, at home and abroad is not an ascertainable fact in any reasonable sense attributable to those words, and the legal conclusion inevitably follows that the provision before us leaves to executive judgment and discretion what the amount of the tax shall be. The executive officers then (taking the whole process together, including the function performed by Tariff Commission and President, and whoever else is con-

sulted), make the law levying the tax, instead of the elected representatives of the people to whim alone such power is committed by the Constitution.

Irrespective of what Page so brilliantly says, we all know from common knowledge that the actual cost of production in no two factories for farms is the same. This is due to differences of location, cost of plant, labor conditions, quality of executive management, method of capitalization, availability and cost of raw material, whether the article is produced directly or with other things as a by-product, distance from the market, weather and climatic conditions, and other causes.

A careful study of the Tariff Commission's elaborate, careful, and painstaking published reports under Section 315, particularly their reports upon "Wheat and Wheat Products," and "Sodium Nitrite" indicate that there are many methods of calculating and averaging which they must choose between in getting the result aimed at. Their discretion in so deciding is necessarily bound, at times, to [fol. 55] affect their conclusion as to what is the actul difference between foreign and domestic costs, for instance.

(1) What area (if not the whole United States), they shall cover to compare with the competing Canadian section in the production of say, hard spring wheat, and whether winter wheat shall be included in the investigation; the tariff rate applying to all wheat?

(2) Whether costs of one current year should be compared or an average over a period of years, say three, taken for comparison.

(3) Whether transportation costs of the foreign and domestic articles to a common market place should be included or excluded from costs of production.

(Note.—If transportation costs to a common market place can be considered, which shall be chosen as between the differing cost of transporting goods, say to a common market in New York, from producers located in Texas, California, Michigan and Maine. Any attempt at averaging these would necessarily be arbitrary and plainly lie in discretion. No averaging would satisfy the long haul producer. If there happens to be more than one common mar-

ket place the difficulty, uncertainty and hence the discretion increases.)

(4) Whether the difference between foreign and domestic costs should be measured between points representing a weighted average cost in the two countries respectively; or at a point representing a cost at or below which the bulk of the American product is produced.

(5) Whether land in the competitive area investigated to determine an agricultural duty should be taken at its rental value or as for a fair return at interest upon its capital value.

(6) What division of costs shall be apportioned between principal and by-products, shown by Page as above, to be necessarily arbitrary.

(7) The readjustment vel non of actual costs to an estimated production equivalent to a given percentage of plant capacity.

[fol. 56] In this connection note "Statement Regarding Mill Feed Costs" by Thomas O. Marvin, chairman of the Tariff Commission, p. 26 of the Commission's Report on "Wheat and Wheat Products," in which, among other things, he says:

* * * the experts of the commission were compelled to prepare an *estimated* or *theoretical cost* based upon a system of allocating a percentage of milling costs in the proportion which *receipts* for mill feed bore to *receipts* for flour. (Italics ours.)

The result of any attempt to choose any method or rule whatsoever for averaging the costs of many different producers whether based upon "a weighted average cost" or upon a "bulk line production cost" or upon any other so-called scientific method, necessarily becomes a mere discretionary guess, i. e., a question of where we choose to draw the line. The final figure arrived at manifestly must depend upon the particular method of averaging which is selected. A method does not become accurate, and its result become certain, by merely giving the process a scientific name. A dream does not become a reality through

descriptive terminology. A guess does not become a fact by calling it a finding.

Selling prices and cost of production are not certainly related to each other. Costs may increase, diminishing profit, without a corresponding higher selling price being necessarily obtainable for the goods. Conversely costs may diminish without sales prices declining proportionately. Consequently assuming the difference in production costs of a particular article at a particular time was mathematically determinable, and an ad valorem rate was proportionally increased, or diminished, to equalize such cost difference; any change in foreign sales prices would at once vary the amount of duty paid and to that extent spoil the equalization between duty and cost difference. As, in ordinary trade, no sales prices long remain constant, and costs of production also continually vary, the impossibility of fixing an ad valorem tariff which would, for any reasonable period of time, accurately represent the difference in cost of production at home and abroad becomes apparent.

Any generalization from such varying factors however intelligently and painstakingly arrived at by executive au- [fol. 57] thority must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the finding are themselves variable and uncertain it is impossible that the generalization from them could attain to greater certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury.

In an address on December 9, 1925, before the American Economic Association published in the Congressional Record of January 4, 1926, page 1051, Dr. F. W. Taussig of Harvard (another former chairman of the Tariff Commission), says:

The point which is important for my present argument is that any decision which is finally reached—any figure which purports to state the differences in cost—necessarily involves the exercise of judgment. No exact and certain conclusion can be reached even by the most perfectly conducted investigation. There is always the possibility of choice between different results, according as you select one or another method of averaging, cover one or an-

other period of time, put your marginal produce of your bulk line at a higher or lower point, consider this figure or that to be the representative one. Even the most competent and impartial Tariff Commissioner will often have to confess that there is no one figure which can be unqualifiedly said to be the accurate one.

Professor Willoughby, in his work on the Constitution, vol. 2, page 1319, in discussing Field v. Clark, says:

The doctrine thus declared is without objection so long as the facts which are to determine the executive acts are such as may be precisely stated by the Legislature and certainly ascertained by the executive.

Were it possible to use the term "precisely stated" in connection with the language of Section 315 it has been fully demonstrated above that the difference in cost of production at home and abroad can not be "certainly ascertained."

[fol. 58] No amount of administrative findings by the most brilliant and painstaking Tariff Commission (which their published reports under Section 315 show the commission to be) can render certain a legislative rule, declaring a policy for the future, which depends upon such factors inevitably fluctuating from day to day. Nothing can be made certain which inherently involves uncertainty.

A commission of experts working at top speed every day of the year, could cover during many years but a small fraction of the rates in the dutiable schedule. Thus, at best, the declared policy of Congress could have only a limited application. Moreover, by the time a necessarily long and elaborate investigation has been concluded conditions may have materially changed. It would ex necessitate rest in the judgment and discretion of the commission, without whose investigation the President can not act (or from the suggestion of the President himself) or the accident of what petitions for changes happened to be filed, as to how far and to what extent the declared policy should be carried out. This itself makes Section 315 speak and operate in terms of executive judgment and discretion.

There is nothing in these provisions to limit the President in making the findings provided for (and the consequent changes in duty) to the report of the Tariff Com-

mission thereon. Manifestly he can also consult data and information furnished him by other experts or departments. This again speaks in terms of discretion.

The constitutional consequences as a precedent from holding this to be a valid delegation of power must be squarely met.

If Congress may direct the executive authority to change existing tariff rates to meet differences in production costs while considering also differences in the sales prices in America of the foreign and domestic articles and "any other advantage or disadvantages in competition," it follows as a logical conclusion that similar action can be taken in relation to income taxes or inheritance taxes, or any other taxes. If this rule of supposed efficiency, or equalization of competition through cost calculations is constitutional, Congress could declare some rule of supposed economic morality for income and inheritance taxes that everyone should pay according to his ability, with authority to the executive to find the facts and establish the classes [fol. 59] or groups upon which, in conformity with such declared rule, income surtaxes or graduated inheritance taxes should be levied, in the amounts as, and upon the classes of persons who) were fixed and determined by the executive, relying upon the best expert economic advice. The supposed facts to be found by the experts would be as easy to find as the supposed facts to be found under this plan. One would no more be a conjecture or guess than the other. What are the rational limits to the new constitutional doctrine here asserted in this statute? All candid men must admit that there are none.

To affirm the assessment before us would open a door into a land which has no boundary and totally obliterate the distinction between legislative and executive powers, and their separation for the protection of liberty, upon which our constitutional structure rests and set up in its place a new executive power under which the citizen is taxed at discretion.

We use the word "fact" in a number of senses. When a jury awards damages for a tort committed, it merely makes a rough guess frequently including punitive damages, i. e., what it considers, as a purely mental operation, outside of any calculation for actual loss, should be added as punish-

ment for the wrong. Reasonable minds will always differ as to whether such verdict (with or without punitive or "mental anguish" additions) accurately compensate the plaintiff for the injury suffered. Neverthless (in both cases) for want of a better term and in poverty of language, we call that "finding a fact" in a legal sense, because the jury rather than the legal functionary, the court, determines it.

It is not the finding of a "fact" in any accurate sense of that term, which Webster calls "a reality," an "event," a "truth." It is a mere attempt to guess at an adjustment which will be accepted as an approximate satisfaction for some faulty human relationship. Such legal process, for rough approximations of this sort, is all that the human mind can devise in aid of bringing about justice between the parties to such litigation.

But here we are not dealing with litigation or with something which can be determined by the processes of litigation. We are dealing with the purely political matter of the levy of a tax upon the citizen by the legislative department [fol. 60] of his Government. This is a political process by which the citizen, acting through his federal legislative agents in Congress, fixes the necessary contributions for the support of the Federal Government. There are no parties whose maladjusted relations are to be approximately adjusted through a legal remedy given. No one has a right to the continuance or imposition of a particular tariff rate. The question before the executive authority under Section 315 is not the assertion or protection of a right, but whether the existing law shall be changed.

It is difficult for either a legal or lay mind to mentally contemplate a suit by a citizen against his Government, or against importers, manufacturers, consumers, or anybody else, brought to determine the amount of a tax to be levied by Government, upon himself or upon any other citizen or class of citizens. It is equally difficult to visualize a court, or a quasi-judicial body with review by the courts, performing a purely legislative function and entering purely legislative judgments and decrees, for the levy vel non of such tax, which the determination of such fanciful suit would involve. It must be said, without hesitation, by all who understand what the American Government, with

its vital separation of legislative, executive and judicial powers, means, that if this act intends to set up such a legalistic unreality as that, it must necessarily fall by its own weight as attempting to make justifiable (with consequent power to the courts to determine it) the purely political act of levying a tax.

We have seen that the finding of damages for a tort by a jury is not accurately described as the finding of a "fact" in the ordinary sense of that word.

On the other hand, when the Secretary of the Treasury measures the number of grains of silver or gold in a foreign coin (as in Arthur v. Richards, 90 U. S. 259; Cramer v. Arthur, 102 U. S. 612; Hadden v. Merritt, 115 U. S. 25, and United States v. Klingenberg, 153 U. S. 93), he determines something about which ordinary minds can not reasonably differ. That is the determination of a fact in the accurate sence.

The amount of a bounty or grant as given on export by a foreign country as measured by the Secretary of the Treasury for the assessment of countervailing duty is [fol. 61] equally definite and certain (see Downs v. United States, 187 U. S. 496, and Nicholas v. United States, 249 U. S. 34).

Again, when Congress leaves it to the Secretary of War to determine whether or not a bridge over a navigable river obstructs navigation that officer merely measures the height of vessels actually using, or capable of using, that stream and by comparing the height of the span of the bridge ascertains whether or not there is such obstruction. That again is the real determination of a fact, concerning which there could not be an honest difference of opinion. That is all that is decided in the cases of the Union Bridge Co. v. United States, 205 U. S. 364; Monongahela Bridge Co. v. United States, 216 U. S. 177, and Hannibal Bridge Co. v. United States, 221 U. S. 194.

Determination of the easily ascertainable fact of discrimination by a foreign country against our commerce as a condition of the application of maximum tariff rates, already written in the statute, as in Field v. Clark, 143 U. S. 649, falls into the same definite class.

It is to this class of definite "facts," to which the courts refer, when they say that the Legislature may delegate the

finding of a fact to executive authority, upon which finding the operation of a statute, already complete in itself, may be made to depend.

Here the insuperable and inherent difficulty, in accurately determining and accurately comparing foreign and domestic production costs, makes the action before us fall into the uncertain and conjectural nature of the other class. Add to that (1) consideration of relative sales prices of the foreign and domestic article in our market and (2) consideration of "other advantages and disadvantages in competition" and the uncertainty and indefiniteness enormously increases and makes sure the conclusion that it falls into that class.

To deny the power asserted in the case at bar would most emphatically not stop the wheels of Government, as was said by the Supreme Court, in the Union Bridge Co. case, supra, concerning the denial of the power to prevent the obstruction of navigation through the action of the Secretary of War there discussed. Its denial here would not hamper in the slightest degree the customary levy of tariff duties by Congress. It would merely strike down an [fol. 62] unwarranted delegation of the taxing power never heretofore attempted.

The claim that finding market value on the day of exportation by appraisement, by way of executing and applying an existing ad valorem rate, a relatively certain and accurate process, which is subject to judicial review before the Board, and the courts on appeal, as to the law involved, and before the Board (a nisi prius court) as to the facts, bears any resemblance whatever to, or serves as any sort of legal precedent for the political levy of new tariff taxes upon the citizen, (l. c., prescribing a tax rate for the future) by means of the complicated formula before us, is so untenable on its face as to merit no discussion.

For those to whom the distinction between executing or applying an existing ad valorem and making a new rate of tax (to apply in the future) by changing the law is not self-evident it may be noted, that: in the rare cases where under former acts, in the absence of sales or offers to sell foreign market value on the day of exportation was arbitrarily found constructively from cost of production, with fixed minimum additions for overhead and profit, merely

the cost in one factory on a day certain was in practice dealt with.

The words "such or similar" never appeared in the cost of production provision used for finding ad valorem value as a dernier resort, by way of executing and applying an existing ad valorem rate, until this very Tariff Act of 1922.

The currency cases, cited by the Government, Collector v. Richards, 23 Wall. 246; Cramer v. Arthur, 102 U. S. 612; Hadden v. Merritt, 115 U. S. 93, and the appraisement cases, Auffmordt v. Hedden, 137 U. S. 310; Passavant v. United States, 148 U. S. 214 (decision below G. A. 899, T. D. 11986); Stairs v. Peaslee, 18, Howard 521; Passavant v. United States, 169 U. S. 16 (decision below G. A. 1602, T. D. 13181), did not involve the question of delegating legislative power. That question is not discussed in the opinions. The question discussed in all of them was whether or not there was any judicial review (and its scope, and the consequent relief vel non on the merits) of the liquidations and appraisements there contested. They consequently give no support to the Government's contention here. The same thing is true of the countervailing [fol. 63] duty cases also cited by the Government, Downes v. United States, 187 U. S. 496 (affirming G. A. 4912, T. D. 22984); Nicholas v. United States, 249 U. S. 34 (affirming G. A. 7758, T. D. 35595), where the issue was whether a bounty or grant had been actually bestowed by the foreign country. No question of delegating legislative power was raised or discussed. Again, the fact that judicial review was denied of certain findings made in those cases and in Franklin Sugar Refining Co. v. United States, 178 Fed. 743, has nothing to do with the question of delegating legislative power, or with the determination of the issues before us.

In the case of Buttfield v. Stranahan, 192 U. S. 470, the act under consideration provided:

> That it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior to purity, quality, and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.
>
> That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the

Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; * * *

That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards. * * * All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

[fol. 64] Mr. Justice White, after holding that Congress has from the beginning exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries, said, page 496:

We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

A careful analysis strikingly differentiates that case from the case at bar,

(1) It does not deal with taxes,

(2) It would be impossible to say that to deny the power of Congress to delegate to executive authority the right to change a duty to equalize foreign and domestic production costs would in effect amount to declaring that the plenary power vested in Congress to levy import duties could not

be efficaciously exerted. That claim would be a little late after Congress for more than 135 years had itself (without any attempt at delegation) levied, during peace and war, all import duties and all other taxes necessary "to pay the debts and provide for the common defense and general welfare of the United States."

(3) Because the establishment of tea standard could, and was reasonably held to be the ascertainment of a fact, as distinguished from a mere guess or conjecture, upon which the Act of Congress expressing its will to exclude from the commerce of the United States tea of inferior purity, quality, and fitness for consumption to such standards, could be made to depend.

[fol. 65] (4) In the tea case Mr. Justice White says:

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider.

That clearly implies that if improper standards had been adopted by the Secretary such act would have been subject to judicial review, at least for bad faith or malice.

It is elementary, on the other hand, that the power here sought to be given to the President is, by its very nature (and also because the President himself exercises it) subject to no judicial review whatsoever. The act does not give, and could not give, to any court judicial authority to review the President's action under these provisions, or to inquire into his motives or good faith in fixing or failing to fix, a particular rate.

If the Tariff Commission reported the necessity of a particular increase, or decrease, of an existing rate by 50 per centum, or the change from a foreign valuation to the socalled American valuation of a similar competing domestic article, and the President refused to declare such change, no court could compel him to do so. Again, if the Tariff Commission reported an increase by 50 per centum and he declared an increase of only 40 per centum, no court could decide whether the Tariff Commission's judgment

should be substituted for his or that the facts warranted either rate.

As soon as an investigation is had by the Tariff Commission the President's discretionary power over the rate investigated, within the limits fixed by the statute, becomes absolute and final. Within those limits he may fix any rate he pleases up or down (or by change of ad valorem), entirely irrespective of, and, if he so finds, directly contrary to, the recommendation of the Tariff Commission. He may even ignore the investigation entirely and decline to make a recommended change. Nothing could more clearly express the power to tax directly lodged in the Executive himself.

[fol. 66] The above considerations demonstate that the case of Buttfield v. Stranaham gives no support to the legality of the power here sought to be granted.

The case of United States v. Grimaud, 220 U. S. 506, cited by the Givernment, dealt with a totally different situation. There was involved only the regulation, management and control of Government property, distinctly an executive duty. Congress expressly authorized the Secretary of Agriculture to make regulations for the management and control of grazing upon a forest reserve for its protection. Congress itself prescribed the penalities for their breach. The authority to make such administrative rules was not a delegation of legislative power at all. The Secretary was not finding facts which would bring a law into effect, but merely managing Government property as directed by Congress. The court says, page 532: "A violation of reasonable rules regarding the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the "penalty."

An analogy is claimed between the levying of a tax through executive authority based on differences in production costs and the action of the Interstate Commerce Commission in first deciding that a rate charged by a common carrier for some public service is unreasonable, and then declaring what will be a reasonable charge for such service.

But historically such analogy fails completely. For declaring a charge for some public service to be unreasonable,

finding a reasonable charge, and giving damages for the difference between the two, was an accepted part of the jurisdiction of all common law courts and exercised by them until such commissions were established. Mr. Justice White, in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, says, on page 436:

Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agree-[fol. 67] ment as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that everywhere, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Comm. 599, and note a; 2 Smith Lead. Cas., pt. 1, 8th Ed., Hare & Wallace notes, p. 457.

After which he concludes that this common law jurisdiction was taken away by the passage of the Interstate Commerce Act given power to pass on the reasonableness of charges to the Interstate Commerce Commission.

The fact is that the powers these commissions exercise (whatever they are now called) thus arose as a judicial function (deciding what was fair or reasonable between conflicting interests) and developed from that. They can now be used in the present form, through such commissions, as more convenient and effective than such original common law jurisdiction. And the same thing is true of the powers of the Federal Trade Commission, subject as they are to judicial review, a mere practical expansion or application of the judicial power existing at common law to curb monopoly and unfair trade practices.

Even after the passage of the Hepburn Act in 1906 giving the Interstate Commerce Commission power to affirmatively fix rates the Supreme Court said in I. C. C. v. L. & N. R. R. Co., 227 U. S., at page 92:

Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the commission may set them aside and require the substitution of just for unjust charges.

In that case the court also points out the judicial review which may be had of the commission's action.

When we come to look at taxation we find no such history. It never was the function of any court to pass on the reasonableness vel non of a tax. Patten v. Brady, 184 U. S., [fol. 68] at page 623; Flint v. Stone, etc., 220 U. S., at page 167; McCray v. United States, 195 U. S., at page 58. The sole function of the courts, in relation to taxes, is to say whether they have been legally appraised and levied upon a proper construction of the statute or whether the statute is a violation of constitutional principles. Therefore it seems clear that no strengthening analogy can be invoked from the quasi-judicial function performed by the Interstate Commerce Commission, with review of its findings for illegality by the courts, in support of the idea that the Legislature might declare a rule of reasonableness, for instance, in relation to taxation and leave it to executive authority to determine what was reasonable and what was not (the Government's contention must go that far); or similarly to declare a rule, as proposed by these provisions, to have the executive authority to fix a tax that would meet the supposed differences between cost of production at home and abroad. A mere glance at the origin, history, and purpose of the power to fix reasonable charges exercised by the Interstate Commerce Commission and the power of taxation here sought to be given to executive authority, shows their complete and fundamental difference. A tax is not a toll. "A tax is a demand of sovereignty, a toll is a demand of proprietorship." Reading R. R. Co. v. Pa., 15 Wallace 232, at page 278.

We are not here dealing with carriers and their legal charge for services. The levy of a tax rate to equalize "differences in cost of production" (even if capable of accurate ascertainment) is not a justiciable subject matter, nor a duty which can be laid upon the courts, either directly or through review of the acts of a commission. Any attempt to so construe these provisions, and thus endeavor to save

an illegal delegation of legislative power, by making justiciable what inherently is not justiciable, involves a hopeless confusion of thought and an utter abandonment of the vital principles of the American Constitutional system. It would be an attempt to first make a delegation of the taxing power to the executive and justify that by passing the delegated power on to the courts, thus making of the Supreme Court, in particular, a sort of council of "Elder Statesmen" to determine our taxation system or carry out an inherently uncertain scheme of taxation based on differences in production costs.

[fol. 69] This should clearly demonstrate that the complicated quasi-judicial form of the novel process here provided for, before and by the Tariff Commission (an arm of the executive) for determining differences in production costs, as to such articles as they, in their discretion (or upon the President's suggestion), shall choose to so determine, as a result of such hearings as they shall have, plus the results of such necessarily ex parte investigation as they must employ, plus a further discretion to the President to follow their findings, and declare the equalizing tax, or not, as he sees fit, after consulting others if he desires, and later to revoke the proclaimed rates when he so decides; is nothing more than a complicated machinery for the taxation of the citizen by executive judgment and discretion and as such plainly an unconstitutional delegation of legislative power.

(2) Moreover, the plan before us is beyond the power of Congress even if it is not held to be an illegal delegation of legislative power. For it purports upon its face to make a levy for a private purpose. It can not be denied that a tariff based upon differences in foreign and domestic production costs executes a frankly declared protective policy. Let this phase of the issue be clearly stated. It is whether the levy itself, laid ostensibly for what we call "protection," and frankly not for the purpose of raising revenue, falls within the definition of the term "tax," levied to pay the debts and provide for the common defense and general welfare of the United States, for which alone authority is given to Congress.

The question is whether a levy can be made, not ostensibly for revenue, thus placing the motive of Congress be-

yond judicial inquiry, but frankly, and on the face of the statute, for a trade advantage to particular citizens (any revenue raised therefrom being merely incidental or accidental) and still be called a tax laid for the "common defense and general welfare."

The rate of 4 cents per pound upon barium dioxide, fixed by the Congress itself in the Act of 1922, is laid in the familiar form used for the purpose of raising revenue (whatever its incidental effect) since the formation of our present Federal Government. The legality of that rate so levied can not be contested. To permit the courts to take proof of its effect, and inquire into the motives of the Con-
[fol. 70] gress in levying a duty in that form, would upset the Government and transfer powers over legislation and over taxation to the judicial branch. The additional 2 cents per pound, however, is expressly stated, by the Congress in Section 315, as well as by the executive proclamation fixing its amount, and directing its levy; to be levied for the sole purpose of equalizing production costs at home and abroad.

Cooley, in his General Principles of Constitutional Law (his law primer for the use of students), Angell edition 1891, p. 54, defines taxes as regular impositions made by Government "for the purpose of raising public revenue."

On page 56 under the title, "The Purposes," he says:

"Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is not to raise a revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles. But if any income is derived from the levy, the fact that incidental protection is given to home industry can be no objection to it, for all taxes must be laid with some regard to their effect upon the prosperity of the people and the welfare of the country, and their validity cannot be determined by the money returns. This rule has been applied when the levy produced no returns whatever; it being held not competent to assail the motives of Congress by showing that the levy was made, not for the purpose of

revenue, but to annihilate the subject of the levy by imposing a burden which it could not bear. Practically, therefore, a law purporting to levy taxes, *and not being on its face subject to objection,* is unassailable, whatever may have been the real purpose. * * * (Italics ours.)

The apparent qualification manifestly refers to an ordinary levy in form for revenue and not to a provision expressing, as does the one before us, the purpose of protection on its face.

[fol. 71] In South Carolina v. United States, 199 U. S. 437, Mr. Justice Brewer, speaking for the majority of the court, says, page 450:

By this clause (the tax clause) the grant is limited in two ways: The revenue must be collected for public purposes and all duties, imposts, and excises must be uniform.

In the case of United States v. Boyer, 85 Fed. 425, at page 432, Rogers, District Judge, says that the words:

"and provide for the common defense and general welfare of the United States" according to the most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

In the case of Loan Association v. Topeka, 20 Wallace 655, Mr. Justice Miller says on page 664:

We have established, we think beyond cavil, that there can be no lawful tax which is not laid for a public purpose.

For conclusive arguments demonstrating that the words "general welfare" as used in the tax clause grant no power whatsoever to the Congress see (1) statement of George Nicholas in answer to Patrick Henry in the Virginia Ratification Convention, 3 Elliott's Debates 244, 245, (2) Paul Leicester Ford's "Jefferson," vol. eleven, page 489, (3) the 41st number of the Federalist, written by James Madison, and (4) speech of Henry St. George Tucker in the House of Representatives March 3, 1926.

No court has ever declared this reference to the "general welfare" to be a grant of power. None ever will. Certainly no court will ever say that it grants power to delegate a trust committed by the people to Congress alone.

Again, a prohibited tax levy or delegation can not become legal by calling it a regulation of commerce as this Section 315 purports to do.

If that were so all express and implied limitations upon the power of taxation would be done away, if the particular act affected commerce, as most taxation does, and it was [fol. 72] merely called a regulation of commerce. These provisions of Section 315 must stand or fall for what they are upon their face, namely, a levy frankly for protection and the attempted delegation of the power to tax, and not by what they are called. (See Child Labor Case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44, and Trusler v. Crooks, decided by the Supreme Court Jan. 11, 1926.) If illegal, as a tax, or as a delegation, the fact that they affect commerce will not save them.

In deciding this case we are bound in our action by the fundamental principle stated by that great judge, James Iredell of North Carolina (afterwards of the Supreme Court), as far back as August 17, 1786, when, in defending the decision in Bayard v. Singleton, 1 Martin's North Carolina Reports, 48, in which he had been one of the counsel, he said:

> An Act of Assembly cannot repeal the Constitution or any part of it * * *. The judges therefore must take care at their peril that every act of the assembly they presume to enforce is warranted by the Constitution, since, if it is not they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, being jurors for the benefit of the whole people not mere servants of the assembly. (The Life and Correspondence of James Iredell, by McRee, vol. 2, page 148.)

These words of that great jurist are directly applicable to our duty here, convinced, as I think we should be, that there is plainly a total lack of constitutional power to accomplish the end here sought.

Neither the doctrine of implied powers, nor the power given to Congress in Sub-section 18 of Section 8 of Art. I, to pass all "necessary and proper" laws to carry out the powers expressly granted, gives any support to the Government position. Power to delegate to executive discre-

tion the levy of a tax upon the citizen can never be implied from the grant of such a trust to Congress alone. Nor could such delegation ever be "necessary and proper" as a means of carrying out a trust exclusively committed to Congress. Nor, if there were no delegation of legislative [fol. 73] power involved, can a levy, upon the face of the statute for protection alone be a tax for the "general welfare."

I feel constrained to hold, for the reasons above set forth, that the portion of the act before us (Section 315), so far as it purports to authorize this increased levy, is contrary to the tenor of the commission granted by the people of the several states to their federal legislative agency, and is therefore void. Judgment should issue sustaining the claim in the protest for classification at 4 cents per pound under paragraph 12 of said act and directing refund of the excess collected above that rate.

The above, upon a subject regularly assigned to the writer, was prepared as for a proposed Board decision. Being disapproved by the majority it is now respectfully filed as a dissenting opinion.

The Constitution may be more easily undermined, and its safeguards frittered away, by specious arguments and strained construction invoked to avoid its plain limitations, than it can be destroyed by direct attack. Consequently it is the duty of all courts (lower courts as well as appellate courts), in deciding constitutional cases, to be eternally vigilant in guarding and defending the fundamental American principles and traditions which that great instrument was designed to secure and perpetuate. The issue is a momentous one and of vital consequence to the future history of this country. Only to the casual and the thoughtless will it seem unimportant. Only they will assume, as of course, the legality of this grave and serious departure from our traditional method of levying federal taxation. The result will affect, not only this plaintiff, but the whole people of America in their historic freedom from the dangers of taxation by executive discretion.

If the majority conclusion is right, the Congress, by declaring a few general principles of taxation, can abdicate the substance of its legislative trust over that entire subject, and pass its representative responsibility over this

power to destroy, to bureaus and commissions (fortified by Presidential Proclamation); thus leaving the people, their business and their property, entirely at their mercy, and necessarily without court review of their taxing discretion. This, in my opinion, is not the American form of represen-
[fol. 74] tative federal government which the Constitution established—at least not the kind I was brought up to believe in.

Geo. Stewart Brown, U. S. General Appraiser.

BEFORE BOARD OF UNITED STATES GENERAL APPRAISERS

No. 1

[Title omitted]

Present: General Appraisers McClelland, Sullivan, Brown.

JUDGMENT—April 6, 1926

The above entitled cause having regularly come on to be heard, and the Board, in its decision dated the 6th day of April, 1926, having determined the law and facts in favor of the Government;

It is hereby ordered, adjudged, and decreed, that the protest in this case be and the same is hereby overruled.

Chas. P. McClelland, Chairman Board 1, by D. P. Dutcher, Chief Clerk. (Seal.)

[fol. 75] IN UNITED STATES COURT OF CUSTOMS APPEALS

[Title omitted]

ORDER ALLOWING FILING OF BRIEF AS AMICUS CURIÆ—June 22, 1926

Charles F. Kingsley, attorney for National Council of American Importers and Traders, Inc., having heretofore applied for leave to file brief in the above-entitled appeal as amicus curiæ, it is

Ordered that said leave be, and the same is hereby, granted, said brief to be filed with the Clerk of this Court and served on all counsel in said appeal on or before July 22, 1926.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

Minute entry of argument and submission October 6, 1926; omitted in printing.

[fol. 76] In United States Court of Customs Appeals

[Title omitted]

Certificate of Importance—Filed October 20, 1926

To the Honorable the Judges of said Court:

In accordance with the provisions of the Act of Congress establishing the United States Court of Customs Appeals, I hereby certify that, in my opinion, the case above-stated is of such importance as to render expedient its review by the Supreme Court of the United States in the manner provided by said act.

This 16th day of October, 1926.

Jno. G. Sargent, Attorney General.

O. K. W. D. M.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES COURT OF CUSTOMS APPEALS, OCTOBER TERM, 1926

[Title omitted]

Flexible Tariff Provisions—Constitutionality

OPINION

GRAHAM, Presiding Judge, delivered the opinion of the court:

The Tariff Act of 1922 contains the following duty provision:

12. Barium carbonate, precipitated, 1 cent per pound; barium chloride, 1¼ cents per pound; barium dioxide, 4 cents per pound; barium hydroxide, 1¼ cents per pound; and barium nitrate, 2 cents per pound.

That act also contains the following administrative provision:

Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): Provided, that the

total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown [fol. 78] that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands,

the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the arti-

[fol. 79] cles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

On May 19, 1924, the President, claiming to act under and by authority of said section 315, issued the following proclamation, which was thereafter duly published. T. D. 40216, 45 Treas. Dec. 669, to wit:

A Proclamation

Whereas in and by section 315 (a) of Title III of the act of Congress approved September 21, 1922, entitled "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes," it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and

proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said ascertained differences in such costs of production necessary to equalize the same;

Whereas in and by section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to the article described in paragraph 12 of Title I of said tariff act of 1922, namely, barium dioxide, being wholly or in part the growth or product of the United States, and of and with respect to [fol. 80] a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said articles wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United

States and in said principal competing country, namely, Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

Now, therefore, I Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the independence of the United States of America the one hundred and forty-eighth.

Calvin Coolidge.

By the President: Charles E. Hughes, Secretary of State. (Seal.)

On June 19, 1924, the appellant imported at the port of New York 292 drums of barium dioxide, which was duly classified for, and assessed with, duty by the collector at 6 cents per pound, in accordance with the aforesaid proclamation of the President. Against this action by the collector, the importer duly filed its protest, alleging therein that the goods were properly dutiable at 4 cents per pound, as fixed by paragraph 12 of said Tariff Act of 1922, that said section 315 was and is unconstitutional, and that all acts pretended to be done thereunder by the President were null and void. This protest was, in due course, referred by the collector to the Board of General Appraisers, and the board, General Appraiser Brown dissenting, overruled the protest and sustained the assessment by the collector. Following the judgment resulting therefrom, the appellant has brought the cause to this court for review.

Many assignments of error are made. These, however, we think may be expressed in three propositions, namely:

First. Said section 315 is unconstitutional in that it attempts to delegate to the President the power to legislate,

a power which can be exercised only by the Congress under Article I, section 1, of the Constitution:

[fol. 81] Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Second. Said section 315 is unconstitutional in that it attempts to delegate to the President the power to tax, a power which can be exercised only by the Congress under Article I, section 8, of the Constitution:

Sec. 8. The Congress shall have power to lay and connect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

Third. Said section 315 is a provision, not for a tax, duty, of excise, but solely for the protection of industries of the United States; and the Congress may not, under the powers given it by the Constitution, so legislate.

It is conceded by the parties that all acts of the President and other officials in the levying of the duty herein have been in conformity with the letter of said section 315.

These propositions will be dealt with as stated.

In considering these matters, certain cardinal principles of interpretation will be borne in mind: First, it is the duty of this court to attempt to ascertain the legislative will, as expressed in the act before us, and to give it effect, if possible; second, every reasonable presumption must be entertained in favor of the validity of the act in question. Adkins v. Children's Hospital, 261 U. S. 525 (544).

On December 6, 1921, the President of the United States, in his annual message to the Congress, called attention to the unsettled international conditions brought about by the World War, and recommended the creation of some legislative machinery whereby customs duties might be made more flexible, to meet such rapidly changing conditions and to prevent the undermining of our national industries. Cong. Rec., vol. 62, pt. 1, p. 37. On August 10, 1922, the Committee on Finance of the Senate presented through its chairman, Mr. McCumber, an amendment to H. R. 7456, then pending before the Senate, which, amended,

became ultimately said section 315. From the remarks of Mr. McCumber on the floor of the Senate while presenting said amendment, Cong. Rec. vol. 62, Pt. 11, pp. 11152-11160, and from the report of the Senate Committee on Finance, S. Rept. No. 595, 67th Cong., 2d sess., it appears that said section 315 was intended to meet the suggestions made by the President in his said message and to provide a method of protecting the industries of the United States during the period of world-wide economic disturbance following the World War.

Section 315 is, obviously, framed to meet these desired [fol. 82] ends. In brief, it provides:

(a) If the President shall find that the duties fixed in the Tariff Act of 1922 do not equalize the differences in costs of production in the United States and the principal competing countries, he shall ascertain the differences and determine and proclaim changes in classifications or increases or decreases in the rates of duty provided by the act sufficient to equalize the said differences in costs of production; but the total increases or decreases shall not exceed 50 per centum of the rates provided in the act.

(b) If the President finds, as to any articles, that he cannot equalize said costs of production under (a), he shall so proclaim, together with a description of the articles to which the proclamation applies; and thereafter the ad valorem duties on such articles shall be based upon their American selling price. These ad valorem rates shall be sufficient to equalize said costs of production, but shall not be decreased more than 50 per centum of the rates named in the act, and such named rates can not be increased.

(c) This subsection enumerates the various factors which the President may consider in so far as he finds it practicable, in ascertaining such differences in costs of production. These are, briefly (1) Differences in conditions in productions; (2) differences in the wholesale selling prices; (3) advantages granted to a foreign producer by his Government, or others; and (4) any other advantages or disadvantages in competition. It provides that the United States Tariff Commission shall make public investigations to assist the President; that no proclamation shall be made by the President until such an investigation has been made;

that whenever he determines that the conditions which brought about such proclamation have changed or no longer exist, he shall modify or terminate it; that he may not transfer any article from the free list to the dutiable list or vice versa, or change any duty in form, and that whenever the act provides a maximum ad valorem duty, he may not exceed that maximum rate.

The three remaining subdivisions are immaterial in so far as this inquiry is concerned.

It is most vigorously contended that this legislative plan is an attempt by the Congress to delegate to the President its power to legislate and fix rates of duties on imports, a power which, under the Constitution, can be exercised only by it. It will be at once conceded by all that, if said section 315 is such an attempted delegation, it can not stand. No. principle is more vital to our national perpetuity, more zealously guarded by our courts, or more earnestly adhered to by our people than the continuance of the integrity and independence of the three departments of our Government—the legislative, the executive, and the judicial.

[fol. 83] What constitutes a delegation of legislative power has been a subject of frequent consideration by our courts.

The Supreme Court, In re Brig Aurora, 7 Cranch, 382, had before it the foreiture of a British vessel which had been sized by virtue of the provisions of an act of Congress dated May 1, 1810, intended to preserve the neutral commerce of the United States from violation. The revival of certain of the provisions of this law depended upon the issuance of a proclamation by the President, after a finding of fact by him, and it was contended that this was a delegation of legislative power. The Supreme Court held to the contrary.

In Miller v. Mayor of New York, 109 U. S. 385, the court had under consideration the act of Congress of March 3, 1869, 15 Stat. 336, ch. 139, granting authority to erect a bridge over the East River and giving to the Secretary of War power to prescribe conditions upon which it should be built. This was held not to be a delegation of legislative power, and it was said:

The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.

Perhaps the leading case and the one most often cited as to what constitutes and what does not constitute a delegation of legislative power is Field v. Clark, 143 U. S. 649. In that case the constitutionality of section 3 of the tariff act of October 1, 1890, was challenged. That section provided that whenever the "President shall be satisfied" that the government of any country producing and exporting sugars, etc., was imposing duties or other exactions upon the products of the United States which, in view of the free introduction of such sugars, etc., into the United States "he may deem to be reciprocally unequal and unreasonable," it should be his duty, by proclamation, to suspend the provisions permitting free entry of such sugars, etc., for such time as "he shall deem just." The act fixed rates of duties to be levied during the continuance of such proclaimed period. Mr. Justice Harlan, in the comprehensive and erudite opinion filed in the case, called attention to the many similar laws enacted continuously since the foundation of the Government which conferred upon the Chief Executive the power to find the facts upon which their going into effect severally depended. In conclusion, the learned jurist summed up in a quotation from Locke's Appeal, 72 Pa. St. 491 (498):

The legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or in- [fol. 84] tends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.

Buttfield v. Stranahan, 192 U. S. 470, involved the constitutionality of a Statute known as the tea inspection act, approved March 2, 1897, 29 Stat. 604. That statute pro-

hibited the importation of tea inferior to standards to be fixed by the Secretary of the Treasury, upon the recommendation of a board of seven members to be appointed by him. This statute also provided that, if imported tea was not up to said standards, it should be exported within six months, or, in default thereof, be destroyed by the customs authorities. It was claimed there, as here, that this was a delegation of legislative authority. This claim, however, was not entertained by the court, and it was said:

We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. * * * Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.

The constitutionality of various similar provisions in other acts has been challenged on similar grounds and the validity of such provisions upheld in the following cases: A provision of the national bankruptcy act of July 1, 1898, recognizing the exemptions fixed by the law of the bankrupt's domicile, in Hanover National Bank v. Moyses, 186 U. S. 181; the act of October 19, 1888, authorizing the Secretary of the Treasury, in case she shall be satisfied an alien is landed contrary to law, to detain and deport him, in the Japanese Immigrant case, 189 U. S. 86; the disposition of public lands by a state, through congressional authority, in Butte City Water Co. v. Baker, 196 U. S. 119; regulations of the Interstate Commerce Commission and Railway Association, fixing standards for draw bars for railway cars, in St. Louis & I. M. Ry. v. Taylor, 210 U. S. 281; orders of the Interstate Commerce Commission establishing methods of accounting, in I. C. C. v. Goodrich Transit Company, 224 U. S. 194; the administration of the short and long haul provisions of section 4 of the act to regulate commerce, as amended by the act of June 18, 1910,

in Intermountain Rate case, 234 U. S. 476; the enforcement of a motion picture censorship law, in Mutual Film Corp. v. Ohio Industrial Com., 236 U. S. 230; a provision [fol. 85] of the Federal reserve act of December 23, 1913, authorizing the Reserve Board to grant special permits to certain national banks to act as trustees, etc., in First National Bank v. Union Trust Co., 244 U. S. 416.

In some cases powers granted to administrative or executive officials or bodies have been upheld as constitutional, even though the exercise of such powers has resulted in the imposition of fines or penalties upon a citizen.

Section 18 of the River and Harbor Act of March 3, 1899, provided that, whenever the Secretary of War had good reason to believe a bridge over a navigable stream was an unreasonable obstruction to navigation, he might, after hearing, order the same changed, and if there was a refusal, cause a prosecution to be had; and that, upon conviction, the offender should be fined as fixed by law. Under this act, in Monongahela Bridge Co. v. United States, 216 U. S. 177, the bridge company was fined, and contended in the Supreme Court that the act in question was a delegation of legislative power. The court did not agree with this contention, and said, in effect, that the statute had declared a general rule or policy, and had merely left to the Secretary of War the task of enforcing its provisions. The Court added:

* * * a denial to Congress of authority, under the Constitution, to delegate to an executive department or officer the power to determine some fact or some state of things upon which the enforcement of its enactment may depend, would often render it impossible or impracticable to conduct the public business, and to successfully carry on the operations of the Government.

To the same effect is Union Bridge Co. v. United States, 204 U. S. 364 (386, 387).

United States v. Grimaud, 220 U. S. 506, involved a regulation promulgated by the Secretary of Agriculture by virtue of the authority of the forest reserve act of March 3, 1891, 26 Stat. 1103, and its amendments. This act as amended provided that the Secretary of Agriculture might make regulations for the protection of such reserves and

that violators of such regulations should be subjected to certain penalties fixed by Revised Statutes, section 5388. Regulation 45, issued in pursuance to such authority, prohibited grazing in such reserves without a permit. Grimaud was indicted for a violation of such regulation, and the matter came up on a demurrer to this indictment, the defendant claiming an unconstitutional delegation of legislative authority. The court held, in an illuminating opinion, that there was no attempted delegation of legislative authority, saying, in part:

But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details."

[fol. 86] Hannibal Bridge Company v. United States, 221 U. S. 194, was a case involving a criminal information against the Hannibal Bridge Co. and others for failing to comply with the orders of the Secretary of War relative to a bridge across the Mississippi River. The defendant claimed an unconstitutional delegation of legislative authority to the Secretary of War. The court held to the contrary, saying:

All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the Government * * *.

The most recent announcement of the Supreme Court on this subject is found in United States v. The Chemical Foundation, Inc., decided October 11, 1926, 272 U. S. 1. This case involved, inter alia, section 12 of the trading with the enemy act of October 6, 1917, 40 Stat. 460, as amended. This section gave to the Alien Property Custodian all the powers of a common-law trustee, with power, under the supervision and direction of the President, to do anything necessary in the administration of the alien property trusts in his keeping. This was claimed to be a delegation of legislative power. But it was said by the court:

The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the act. When the plenary power of Congress and the general

rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power.

The following authorities and cases announce the same general principles: Cooley on Taxation, vol. 1, p. 100; Gray's Limitations of Taxing Power, 539; Cooley's Cons. Lim., p. 164 (7th ed.); Willoughby on Constitution, sec. 775, p. 1318; St. L. M. B. Co. v. United States, 188 Fed. 195; State v. Public Service Com. (Mo.), 194 S. W. 287 (296); State v. Briggs, 77 Pac. 750 (Ore.); People v. Fire Assn., 92 N. Y. 311; State v. A. C. L. R. Co., 56 Fla. 616 (623-626); United States v. Domingo, 152 Fed. 566; Dastervignes v. United States, 122 Fed. 30; C. W. & Z. Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. 87; State v. C. M. & St. P. Ry. Co., 38 Minn. 298-299; Wayman v. Southard, 10 Wheat. 1-41.

From a consideration of the authorities cited, it must be concluded that the law is well settled, and is, perhaps most happily expressed in C. W. & Z. Railroad Co. v. Commissioners, supra:

The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.

[fol. 87] And this must, by the very force of circumstances, be the conclusion inevitably to be arrived at by any judicial tribunal. To-day the functions and requirements of government are so diverse and multiplied that no legislative body can, by statutory enactment, provide for each specific governmental need which may arise. If, perchance, it has wisdom and foresight sufficient to provide general policies which may apply, it has accomplished much.

Viewing said section 315 in the light of these authorities and its legislative history, it at once becomes evident that the Congress has endeavored to express therein a general legislative policy. This policy is to levy upon imported products sufficient duties to equalize the differences in cost of production in the United States and the principal competing countries from which such imports come. Under

ordinary circumstances, the duties are those specifically named in the act; but, whenever these are insufficient to accomplish this expressed purpose, they shall be, within certain precautionary minima and maxima, increased or decreased accordingly. There is no uncertainty here as to the congressional intent and policy; no dicretion is attempted to be given to the President to determine what the policy shall be; the law imposes upon him no duties and confers upon him no powers except to execute the law, if it be capable of execution. When the President proclaims a change of rate thereunder, the new rate of duty does not come into being as a result of the proclamation, but the proclamation and the rate of duty result from the law.

But it is contended by the appellant, that, even it it be conceded that the Congress has, in section 315, announced a general policy and purpose, that purpose is impossible of accomplishment because of the uncertainty of the act itself; that, using the various factors set forth in subsection (c), the President will not be able to compute and ascertain the differences in cost of production of an imported product in the United States and the principal competing country; and that, even if he uses such factors, the language describing them is so broad and general as to leave him such latitude as to the means of computation that he may levy duties on imported products according to his discretion, thus exercising a purely legislative power.

Section 315, in substance, requires the President, before proceeding to make a change in the dutiable rate of an article, to make two findings of fact. First, he must find that the rate of duty specifically fixed by the act is not sufficient to equalize the differences in cost of production in the United States and in the principal competing country. To do this, the President must, of course, ascertain three subsidiary facts: (a) What the principal competing [fol. 88] country is; (b) what the cost of production is in the United States; and (c) what the cost of production is in the principal competing country. Second, he must find what amount of decrease or increase of rate is necessary to equalize such difference. When he has made these findings of fact, the mandatory duty is laid upon him by the statute to make proclamation accordingly; in this respect, the law gives him no discretion.

It will be at once conceded, on a reading of section 315 (c), that a very broad latitude is given to the President in making such findings of fact. The various factors named in the subsection are to be used by him "in so far as he finds it practicable." A consideration of this language, taken with clause 4, "any other advantages or disadvantages in competition," makes it manifest that the Congress intended to give to the President and to the Tariff Commission prosecuting the same inquiry, discretion as to the means to be employed in ascertaining the facts; the factors were not to be confined to those enumerated in the statute, but, in order that there might be no misunderstanding as to the factors which might be considered, it was provided that the various factors specifically named might, inter alia, be considered by the President, if practicable, in arriving at the result.

From a very early period in our Government similar fact-finding powers to those here directed to be exercised by the President have been exercised by various officials connected with the collection of import duties. The act of April 20, 1818, 3 Stat. 433, provided for the appointment of appraisers at certain ports of the United States, whose duty it was to estimate, in certain cases, the foreign market value of imported goods subject by law to ad valorem duties. No legislative restrictions or directions were made as to methods to be employed by them in arriving at such values. They were required only to find the facts, in any way they thought best. This general authority of appraisers, further developed by section 4 of the act of May 28, 1830, 4 Stat. 410, has continued until the present time. Tariff Act of 1922, sec. 500. The tariff act of August 30, 1842, 5 Stat. 563, section 16, provided that imported goods subject to ad valorem duties should be appraised according to their wholesale market value in the principal markets of the countries from which exported. It will not be necessary for the purposes of this opinion to more than refer, in passing, to the development of the method of appraisement by the creation of local appraisers and a board of three general appraisers. Sections 12-13, customs administrative act of June 10, 1890, 26 Stat. 136-137. We have, in United States v. Spingarn, 5 Ct. Cust. Appls. 2, traced the development of the methods [fol. 89] of appraisement of imported merchandise. See

also United States v. McConnaughey & Co., 13 Ct. Cust. Appls. 112.

By means of this legislative machinery, for over one hundred years the foreign market values of vast quantities of imported goods have been fixed at our ports and the principal markets of foreign countries have been ascertained. Necessarily, many elements have entered into such calculations, elements which have differed according to the circumstances of the particular case and the judgment of the appraiser who functioned in the matter. There could be no uniformity of procedure or scientific accuracy in such appraisements. It will be noted also that such appraisements determined the amount of ad valorem duties to be collected, unless entered at a higher value. Yet, whenever such appraisements have been questioned in the courts they have been sustained and the findings of fact made by the appraising officer or officers have been held to be conclusive, except when errors of law have intervened. Stairs v. Peaslee, 18 How. 521 (527); Hilton v. Merritt, 110 U. S. 97 (106-107); Auffmordt v. Hedden, 137 U. S. 310 (324); Passavant v. United States, 148 U. S. 214 (220-221); Muser v. Magone, 155 U. S. 240 (247); Beer v. United States, 1 Ct. Cust. Appls. 484; Austin, Baldwin & Co. v. United States, 7 Ct. Cust. Appls. 186; Stirn v. United States, 10 Ct. Cust. Appls. 17; Goodyear Tire & Rubber Co. v. United States, 11 Ct. Cust. Appls. 351. The decisions cited are based in part upon the principle of inviolability attached to the finding of fact by an administrative official when he proceeds within the law, and in part upon statutory enactments making such appraisements final and conclusive. Sec. 14, customs administrative act of June 10, 1890, 26 Stat. 137; sec. 13, tariff act of August 5, 1909, 36 Stat. 99; par. M, Sec. III, tariff act of October 3, 1913, 38 Stat. 186. While we do find that the constitutionality of the various statutes providing for such appraisements or making the same conclusive has been directly attacked in the cases cited, as a delegation of legislative power, the facts that for a century the legislative policy has been indicated by these various acts, and that they have been universally treated by the courts as valid must be given great weight in coming to a conclusion as to their validity.

The act of March 3, 1873, 17 Stat. 602, instructed the Director of the Mint to estimate annually the values of standard coins of foreign countries and the Secretary of the Treasury to proclaim such values annually. A similar method of ascertainment of such values still obtains. Sec. 522, Tariff Act of 1922. Such ascertainment necessarily leaves to the official making it a wide latitude as to methods. It follows that the amount of duty may be affected by the methods used and results obtained by this official. Such statutes have, however, universally received the approval [fol. 90] of the courts. Cramer v. Arthur, 102 U. S. 612; Hadden v. Merritt, 115 U. S. 25 (27); United States v. Klingenberg, 153 U. S. 93 (100).

Section 5 of the tariff act of July 24, 1897, provided for a countervailing duty to be levied upon the products of any country which bestowed any grant or bounty upon goods exported; the net amount of these bounties or grants was to be ascertained and proclaimed from time to time by the Secretary of the Treasury. No method was prescribed by which these determinations should be made. A similar provision still obtains in the law of customs. Sec. 303, Tariff Act of 1922. The exercise of these functions by the Secretary of the Treasury has been judicially approved, although the extreme difficulty of making such ascertainment has not been overlooked by the courts. Downs v. United States, T. D. 22984, 4 Treas. Dec. 405; aff. in 113 Fed. 144; aff. in 187 U. S. 496. Nicholas & Co. v. United States, 7 Ct. Cust. Appls. 97, aff. in 249 U. S. 34.

Section 11 of the tariff act of July 24, 1897, 30 Stat. 212, contained a provision that when the actual market value of an imported article could not be ascertained "to the satisfaction of the appraising officer," he should estimate the cost of production thereof and return the same as the dutiable valuation. This provision of law was continued in section 11, tariff act of August 5, 1909, 36 Stat. 97; in paragraph L, section III, tariff act of October 3, 1913, 38 Stat. 185; and in section 402 (c), Tariff Act of 1922, 42 Stat. 949. It will thus be seen that this provision of law, which, it must be assumed, was functioning in a satisfactory manner, has received legislative approval for many years. This court has on several occasions, while not called upon to decide the constitutional question here involved, inter-

preted and sustained it. Austin, Baldwin & Co. v. United States, 7 Ct. Cust. Appls. 186; Stirn v. United States, 10 Ct. Cust. Appls. 17; Goodyear Tire & Rubber Co. v. United States, 11 Ct. Cust. Appls. 351.

Paragraph 28 of the Tariff Act of 1922 fixes certain ad valorem duties upon enumerated coal-tar products, providing that the duties shall be computed upon the American selling price of the same. The American selling price, as defined in section 402 (f) of the same act, is the price, including cost of containers and other costs, etc., incident to placing the merchandise in condition packed ready for delivery, at which the said article is "freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market," or the price which the owner, etc., would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation. It will be observed that an extremely wide [fol. 91] range of discretion is given by this statute to the appraising officer as to methods of ascertainment of the American selling price. Upon the result of the methods used by him, the amount of duty paid will be increased or decreased. In Kuttroff, Pickhardt & Co. v. United States, 12 Ct. Cust. Appls. 299, the constitutionality of this statute was challenged, it being claimed that, as a matter of fact, the Congress had by said paragraph 28 delegated to the American producers the power to fix the rates of duty upon competitive imported products. We held the paragraph to be an exercise of constitutional power by the Congress.

We have already, in another connection, called attention to Field v. Clark, 143 U. S. 649, and Buttfield v. Stranahan, 192 U. S. 470. It is only necessary at this time to point out that, in both cases, particularly the former, the very broad latitude given to the executive equaled, if it did not much exceed, that claimed to be given by the statute before us. It would be quite difficult to conceive of a greater range of authority than that found in Field v. Clark, where the Chief Executive was emplowered to take certain imports from the free list and place them upon a dutiable list, when "he was satisfied" that duties were being imposed by some country upon our exports, which "he may deem to be

reciprocally unequal and unreasonable." In other words, under the statute in the Field case the President was empowered to make goods dutiable by removing them from the free list. No attempt was there made as in the statute before us now, to name any elements which the President might make use of in arriving at a finding of fact. It is contended that the Field case, supra, differs from the one at bar here, in that in the Field case, specific rates of duty were named in the act to take effect upon the issuance of the President's proclamation, and here the rate is to be fixed by the President. We are unable to perceive the difference. In each case, the effort of Congress was to protect products of the United States which might be threatened by injurious competitive products from abroad—in one case by unfair governmental methods, in the other by differing business conditions. The important thing in each case was that an amount of duty be imposed, sufficient for the protection of the threatened industry. It cannot be concluded that naming the rate in the Field case and directing the Executive to compute it in the case at bar make that law constitutional and this one unconstitutional. The Constitution, in conferring upon the Congress the power to "lay and collect * * * duties," does not declare, even by implication, that the Congress must exercise the power thus given to it by naming in specific terms the rate of duty to be applied. When it appears that the power to lay duties has been given to the Congress without reservation, we may [fol. 92] safely conclude that the way in which that power shall be exercised is left to its discretion. As was well said by the great Chief Justice in McCulloch v. Maryland, 4 Wheat. 315:

But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

See also Osborn v. United States Bank, 9, Wheat. 737, and Murray's Lessee et al. v. Hoboken, etc., 18 How. 272 (281).

Whether the particular statute before us is wise or unwise is not for our consideration. This is a political ques-

tion, with which courts will not deal. The cure for an unwise and injudicious exercise of its constitutional powers by the Congress lies with the people, from whom its members derive their commissions. Springer v. United States, 102 U. S. 586; Kuttroff, Pickhardt & Co. v. United States, 12 Ct. Cust. Appls. 299 (304); McCray v. United States, 195 U. S. 27 (54); Flint v. Stone, Tracy Co., 220 U. S. 107 (169).

The statements of many persons are cited, some of whom are present or past members of the United States Tariff Commission, to the effect that it is impossible to precisely establish the cost of production of an article. This may be conceded. It is likewise impossible to ascertain, aside from the realm of mathematics, with scientific accuracy, most of the things upon which our lives and human governments depend. At most, we must be content with a reasonable accuracy, and this, we believe, is all that is required in the administration of the law now before us. As was said in Cramer v. Arthur, 102 U. S. 612 (617), a case involving the conversion of currency:

> The Government gets at the truth, as near as it can, and proclaims it.

And in Patton v. Brady, Executrix, 184 U. S. 608 (622), in commenting upon the uniformity clause in Sec. 8, Art. I of the Constitution:

> Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once.

We are, therefore, of the opinion that section 315 is not so uncertain of administration as to amount to a delegation of legislative power to the Chief Executive, but is, in that respect, a valid exercise of the constitutional power of the Congress.

It is next contended by appellant that the President cannot be haled into court and sued by a citizen; that his acts under section 315 are not reviewable by the courts; that the acts of an administrative officer exercising delegated [fol. 93] power must, if they are to be held valid, always be so subject to review; and that the President may under this section, practically rewrite a tariff law in form and in substance, without accountability to anyone. If this be

true, it goes without saying that the section can not be sustained. But we can not agree with either the premises or the conclusion. The office of President is one of high standing and vast responsibility; public policy requires, and the courts have uniformly held, that, in the discharge of his high office, in all those matters which have been entrusted to his discretion, he is not to be interfered with or under the control of the courts. Such powers are political in their nature and for the proper exercise of these the President is responsible only to the country. The power of the President to appoint diplomatic representatives, members of the judiciary, and subordinate officials, to negotiate treaties, to control and direct the activities of the Army and Navy, to supervise foreign relations, and to recommend and veto acts of the legislative branch of the Government, are patent examples of such powers. In the execution of such powers, the President may act unwisely and to the great injury of individual and national interests, but for such acts there can be no remedy, under our Constitution, but the political one committed to the suffrage of the people. But when duties are imposed upon the President over and beyond his purely political ones, duties which he does not perform because of his constitutional power as Chief Executive but because the Congress has constituted him an agent for the better execution of some legislative policy, and in the execution of which powers personal or property rights are involved, then such acts are ministerial only, and are subject to review by the courts. Or, as was better said by Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137 (166), speaking of the Secretary of State:

> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

This conclusion finds further support in the following authorities: State of Mississippi v. Johnson, 4 Wall. 475 (500); Morrill v. Jones, 106 U. S. 466; Webster v. Luther, 163 U. S. 331 (342); United States v. Wong Kim Ark, 169 U. S. 649 (694); American School of Mag. Healing v.

McAnnulty, 187 U. S. 94 (110); Burfenning v. C. St. P. etc., Ry., 163 U. S. 321 (323); Monogahela Bridge v. United States, 216 U. S. 177 (195).

It is probable that the Congress conferred upon the President this grant of power with the idea that, because of the [fol. 94] great publicity attending the acts of the Chief Executive and his great responsibility to the people, there would be less likelihood of precipitate and illadvised action, and greater dignity and standing would attend the accomplished act. But whatever the legislative purpose may have been, the acts of the President thereunder are entitled to no greater significance and should be measured by no other rule than that to be given and used in considering the acts of any other fact-finding official or board which the Congress may have named.

The law is not concerned as to the identity or official standing of the person who shall perform the duties required, but regards only the powers which are granted and the things which may be done as a result of such grant. An analysis of section 315 discloses that the President is not therein given any discretion as to what he shall do, but only as to how he shall do it. We have hereinbefore set out at some length the powers granted by the section, and it is not necessary to recount them again. It will suffice to say that the powers granted to the President by the section are circumscribed within narrow bounds. Under subsection (a) he may increase or decrease the rate or change a classification, but only to the extent necessary to accomplish the purpose of the Congress, and then not more or less than 50 per centum of the rates specified in the act. He may not change the classification of a dutiable article from the free list to the dutiable list or vice versa, or from a specific to an ad valorem rate, or vice versa. Under subsection (b) he can not decrease an ad valorem rate more than 50 per centum of the rate specified in the statute, and he cannot increase such rate. He can take no action under this section without a prior investigation by the United States Tariff Commission. He must proclaim a change back to the rate specified in the statute when the emergency is at an end. If, in case of any duty provision specified in the statute, the President has not proclaimed a change of rate or classification as provided in section 315, it must be presumed, as a matter of law, and agreeably to the familiar

doctrine that every public official must be assumed, in the absence of proof to the contrary, to have performed his duties in pursuance to law, that, as to such rate, the President has not found that such changes are necessary to equalize the differences in cost of production in the United States and the principal competing country. The first announcement of a finding requiring such a change in duty is the proclamation to be issued by the President. Until such proclamation has been issued, the President may not, under this statute, be coerced or controlled by the mandates of the courts.

But when, in the performance of his duties, under this section, the President proclaims a change of duty, if in so doing, he acts beyond the law or fails to comply with its express mandates, then we cannot doubt that the person [fol. 95] aggrieved thereby may find adequate relief in the courts. We need not go beyond the case at bar for an illustration of this. Here the importer has protested against the imposition of additional duties because of the alleged unconstitutionality of the act under which it was imposed, and upon that claim he is entitled to a proper hearing in the courts. Can it be denied that if, in the imposition of this rate of duty, the President had proceeded without taking the steps directed by section 315, the importer could have set these facts out in his protest and had an adjudication thereon? To deny this would be to give to the act of the President a peculiar sanctity and inviolability not attaching to the acts of other officials of the Government performing similar fact-finding duties; and this we are neither called upon to do nor justified by the law in doing. We are unable to see why any different rule of law should be applied to the President's finding of facts under section 315 than the one applied to the finding of valuation by an appraiser of merchandise at our ports. In such cases, while the courts have held the finding of valuation made by the appraiser to be conclusive, if he proceeds upon a wrong principle, contrary to law, his acts are subject to judicial control and correction. Badger v. Cusimano, 130 U. S. 39; Robertson v. Frank Bros. Co., 132 U. S. 17 (24); Muser v. Magone, 155 U. S. 240 (247); United States v. Passavant, 169 U. S. 16 (21).

We are, therefore, unable to agree with this contention made by appellant.

Finally, it is argued that section 315 discloses that its primary and only purpose is the protection of the industries of the United States and not the raising of revenue for governmental purposes; that the section, in effect, proposes to take from the pockets of the taxpayers, moneys with which to protect a favored class, and that the Congress has no constitutional power to so legislate.

The Tariff Act of 1922 is entitled "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes." 42 Stat. 941, 942. In each of the subsections (a) and (b) of section 315 the preamble is "That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended," and in each the preamble is followed by a recital that this policy is to levy duties, within certain prescribed limits, sufficient to equalize the differences in costs of production in the United States and the principal competing foreign countries. This appears plainly to be an effort to afford protection to certain industries of the United States. But must this protection be considered as the sole and only reason for the legislation, or as a purpose incidental to its revenue provisions? We believe the [fol. 96] latter view should obtain. The Constitution gives to the legislative branch of our Government the right to levy taxes and duties. Aside from the constitutional inhibition against taxes on exports and the requirement of uniformity in indirect taxes and proportion in direct taxes, the power to impose such taxes and duties was given without reservations. How or when they may be imposed are political questions. Lane County v. Oregon, 7 Wall. 71 (77-79); Loan Assn. v. Topeka, 20 Wall. 655 (663). It therefore frequently occurs that taxes or duties are imposed which have a double purpose of revenue and other purpose thought to be for the public welfare. In such cases the courts have usually held the revenue purpose to be controlling and the public-welfare purpose to be incidental only. A case in point is In re Kollock, 165 U. S. 526. There Kollock was indicted and convicted for a violation of the oleomargarine act of August 2, 1886, 24 Stat. 209, ch. 840. That act fixed certain taxes to be paid by manu-

facturers and dealers in oleomargarine, and provided generally for the conduct of such business. Appellant contended the act was a penal statute, that it delegated the power to the commissioner to define the crime, and was hence invalid. The Supreme Court said:

The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

In United States v. Doremus, 249 U. S. 86, the constitutionality of the narcotic drug act of December 17, 1914, 38 Stat. 785, was assailed. The court, in sustaining the constitutionality of this act under Article I, section 8, of the Constitution, said:

And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it can not be invalidated because of the supposed motives which induced it.

In the Child Labor Tax Case, 259 U. S. 20, the court, while holding the particular statute before it to be invalid, recognized and reiterated the doctrine announced in the above cases, in these words:

Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive.

The statute before us here does not appear to be subject to the objections which influenced the judgment of the court in the Child Labor Case, supra. Section 315 is a part of a comprehensive and complete revenue measure, and, although the purpose of protection to domestic industries is plainly evident therein, this purpose must, we believe, in harmony with the authorities cited, be held to be one incidental to the primary purpose of revenue.

[fol. 97] If, however, section 315 may be considered merely as a measure for the protection of domestic industries, and not as a revenue measure, it is argued by the Government that, as such, it is a valid exercise of the power granted to Congress in Article I, section 8:

> The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

As has already been noted, both the title of the Tariff Act of 1922 and the text of section 315 recite that one of the purposes of said act and section is to regulate the foreign commerce of the United States. The congressional intent is therefore plainly evident. But is the levying of discriminatory duties upon certain classes of imports in order to protect and encourage certain domestic industries a proper exercise of the constitutional grant of power to regulate commerce? This raises a question of much nicety but one which, we think, may be answered by reference to a line of legislative enactments and judicial pronouncements extending back into the earliest periods of the existence of our Government.

Section 1 of the tariff act of July 4, 1789, 1 Stat. 24, the first tariff act enacted by the Congress of the United States, contained this preamble:

> Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufacturers, that duties be laid on goods, wares and merchandises imported:

Following this act, a legislative policy of protection for the shipping and industries of the United States began, a policy which has continued through every general tariff revision act, and in many customs administration and other acts, from that time to the present. Many of these acts, for convenience in reference, are enumerated in the margin.[1] For 138 years this legislative practice has per-

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[1] Sec. 5, act of July 4, 1789 (1 Stat. 24); secs. 2, 3, and 4, act of Aug. 10, 1790 (1 Stat. 180); sec. 51, act of Mar. 3, 1791 (1 Stat. 210); sec. 3, tariff act of Mar. 27, 1804 (2 Stat. 299); sec. 4, tariff act of Apr. 27, 1816 (3 Stat. 313); sec. 1, tariff act of May 6, 1822 (3 Stat. 681); sec. 4, act of Jun. 7, 1824 (4 Stat. 3); sec. 3, act of Apr. 20, 1826 (4 Stat. 154); act of May 9, 1828 (4 Stat. 269); sec. 1, act of May 24, 1828 (4 Stat. 308); act of May 29,

sisted unchallenged and apparently with the approval of the people. While we do not wish to be understood as holding that such a legislative practice is in itself conclusive as to the constitutionality of a measure framed along such lines, or that continued legislative practice can make constitutional that which is clearly unconstitutional, yet a legislative practice of such long continuance (some of which is [fol. 98] contemporaneous with the Constitution) and so well understood and tacitly agreed to, must be given great weight in determining the validity of a legislative enactment the constitutionality of which is thought to be doubtful; and such has been the uniform holding of our courts. Stuart v. Laird, 1 Cranch, 299 (309); Waring v. Clarke, 5 How. 440 (458); Cooley v. Philadelphia, 12 How. 299 (315); Veazie Bank v. Fenno, 8 Wall. 533 (544); Ames v. Kansas, 111 U. S. 449 (469); Field v. Clark, supra, 683; McPherson v. Blacker, 146 U. S. 1 (27); Fairbank v. United States, 181 U. S. 283 (307); McGrain v. Daugherty, — U. S. —, decided January 17, 1927.

The scope and extent of the congressional power to regulate commerce has received the frequent consideration of the Supreme Court of the United States. A brief reference will be made to some of the cases.

Gibbons v. Ogden, 9 Wheat. 1, the leading case on the subject, concerned an alleged exclusive franchise for navigating certain waters of the State of New York. In that case it was pointed out (pp. 200-202) that the act of laying duties on imports must be considered primarily as a branch of the taxing power as given by section 8, Article I, of the Constitution. But it was also observed:

It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed, with a view to revenue;

Russell v. Williams, 106 U. S. 623, dealt with certain imports from China, subjected to an additional 10 per centum

1830 (4 Stat. 419); sec. 1, act of May 29, 1830 (4 Stat. 419); sec. 3, act of July 13, 1832 (4 Stat. 579); sec. 1, act of July 14, 1832 (4 Stat. 604); act of Mar. 3, 1845 (5 Stat. 748); secs. 1 and 4, act of Mar. 1, 1873 (17 Stat. 482); sec. 3, and par. 231, sec. 17, act of Oct. 1, 1890 (26 Stat. 567); secs. 21 and 22, tariff act of Aug. 27, 1894 (28 Stat. 551); title and sec. 4, tariff act of July 24, 1897 (30 Stat. 151); title and secs. 2, 4, and 6, tariff act of Aug. 5, 1909 (36 Stat. 11); Sec. IV, A and E, tariff act of Oct. 3, 1913 (38 Stat. 192).

ad valorem duty under section 6 of the tariff act of March 3, 1865, which provided such an additional duty upon any merchandise imported from any place east of the Cape of Good Hope. The court held that this provision of the law was intended to be, and was, a regulation of commerce under the constitutional provision cited.

In Buttfield v. Stranahan, supra, the court, in discussing the tea inspection act of March 2, 1897, 29 Stat. 604, said:

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. * * * it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation.

On numerous occasions acts of Congress declaring embargoes either directly or by proclamation of the President, have been sustained as a valid exercise of its constitutional power to regulate commerce. The Brig Aurora, supra; State of Pennsylvania v. Wheeling and B. Bridge Co., 18 [fol. 99] How. 421. In the case last cited it was said (439):

During the existence of the embargo, in the year 1808, it was contended that, under the commercial power, an embargo could not be imposed, as it destroyed commerce. But it was held otherwise; so that the constitutionality of a regulation of commerce by Congress does not depend upon the policy and justice of such an act, but generally upon its discretion.

In Leisy v. Hardin, 135 U. S. 100, Mr. Chief Justice Fuller said for the court (116):

And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded.

To the same effect are Field v. Clark, supra, and The Abby Dodge, 223 U. S. 166 (176).

In the celebrated case of Brown v. Maryland, 12 Wheat. 419, the court, after observing that commerce is intercourse, stated:

It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete should cease at the point when its continuance is indispensable to its value. * * * Congress has a right, not only to authorize importation, but to authorize the importer to sell.

The act of February 13, 1862, 12 Stat. 338, prohibited the sale of spirituous liquors to certain Indians. The Supreme Court, in United States v. Holliday, 3 Wall. 407 (417), held the act valid as a regulation of commerce. In Case of the State Freight Tax, 15 Wall. 232, the court quotes with approval the definition given by Judge Story of the word "commerce," as used in the Constitution:

Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufacturers, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.

In Henderson v. Mayor of New York, 92 U. S. 259, and in Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320 (334), the regulation of foreign immigration was held to be within the congressional power to regulate commerce. The power to build or encourage interstate railways and highways was sustained as a proper exercise of that power in California v. Pac. R. R. Co., 127 U. S. 1 (39).

Reference is also had to the Lottery Case, 188 U. S. 321 (359), sustaining the anti-lottery act of March 2, 1895, 28 Stat. 963, and Hoke and Economides v. United States, 227 U. S. 308 (323), sustaining the validity of the Mann Act of June 25, 1910, 36 Stat. 825.

In Hammer v. Dagenhart, 247 U. S. 251, the constitutionality of the child labor act of September 1, 1916, 39 Stat. 675, was involved. The statute was held not to be a regu- [fol. 100] lation of interstate commerce. The court there observed that there were special reasons, based upon public policy, which led to the conclusion in Hoke v. United States, supra, and other similar cases, which do not ob-

tain in ordinary commercial intercourse. It was, however, reiterated that Congress had ample power to regulate commerce, except wherein it might attempt to assume a jurisdiction of the States, reserved and not granted by the Constitution.

The rule, we believe, to be gathered from the cases cited, when read in the light of the later announcement in Hammer v. Dagenhart, supra, and with due consideration for the perpetuation of our dual system of national and state governments, may be stated thus:

In foreign commerce, the power to regulate includes the right to levy discriminatory duties and the right to prohibit; and this legislative right is absolute.

In interstate commerce the right to regulate includes the right to prohibit when the character of the traffic prohibited is such as to require prohibition for the public welfare. In such cases the test is always the character of the act prohibited. Where there is no reasonable ground for the prohibition, resulting from a public necessity, such prohibition of commerce will not be upheld.

In Houston, East & West Texas Ry. v. United States, 234 U. S. 342 (351), the court in discussing the constitutional power of Congress to regulate commerce, said:

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (The Daniel Ball, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (County of Mobile v. Kimball, supra); "to foster, protect, control and restrain."

Again, in Dayton-Goose Creek Railway v. United States, 263 U. S. 456 (478), it was said:

This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

While the last two cases cited dealt with questions of interstate commerce, no reason is apparent why the same conclusions should not be reached in matters pertaining to foreign commerce, the constitutional grant of power as to each being incorporated in the same language.

From a consideration of these authorities, together with the evident purpose of the Congress as expressed in the act before us, section 315, imposing sufficient duties upon imported products to equalize the difference in cost of production in the United States and the principal competing country, is a valid exercise of the constitutional grant of power to the Congress to regulate commerce. It was for [fol. 101] the Congress to select the means by which it thought the best interests of the country would be served in encouraging, fostering, and protecting the commerce and industries of the country. Having done so within constitutional limits, the courts will not interfere. If it be said that legislation which thus protects one industry at the expense of others should be declared invalid therefor, then we must deny to the Congress the power to lay any duties at all. The power to lay duties implies the power to select the objects upon which such duties are laid. Necessarily, the laying of a duty upon one product and not upon another may give added advantage or disadvantage to the domestic producer of the product thus made dutiable. But what might be said of the inequality of the laying of duties may also be said of all taxes laid for public purposes. The needs occasioned by drought, famine, pestilence, and flood, the pauper, the dependent, and the criminal, are burdens unequally borne; and yet, while the means of one citizen are taken from him to minister to another, it is still deemed to be a public purpose, the benefits of which all citizens equally enjoy. The right of our National Legislature to take such steps as the people, acting through it, may think best suited to protect, foster, and encourage its commerce and industrial life cannot be denied; for to so deny it would be to deny the sovereign right which every properly constituted government has to perpetuate itself and to accomplish one of the chief purposes for which it was created.

It is apparent, from the facts hereinbefore recited and the discussion had, that the single question presented for determination is, whether Congress, in attempting to grant

to the President the power to increase the rates of duty specified in the statute by adding thereto the differences in cost of production ascertained by him under section 315 (a), acted within constitutional limits, or whether such act was in that respect, null and void; and our decision is limited to that precise question.

We find no error in the record and the judgment of the court below is affirmed.

Affirmed.

[fol. 102] In United States Court of Customs Appeals

No. 2761

[Title omitted]

Judgment—February 24, 1927

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is

Ordered that the judgment of the Board of United States General Appraisers, now the United States Customs Court, be, and the same is hereby, affirmed.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

In United States Court of Customs Appeals

Certificate re Mandate

The final mandate, consisting of a certified copy of the above order of the Court, of the 24th day of February, 1927, was issued to the United States Customs Court on the 26th day of March, 1927.

Arthur B. Shelton, Clerk.

[fol. 103] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1927

The petition herein for a writ of certiorari to the United Court of Customs Appeals is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 6, 1927.

Endorsed on cover: File No. 32,682. U. S. Court of Customs Appeals. Term No. 242. J. W. Hampton, Jr., & Co., petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 10th, 1927. File No. 32,682.

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